Supreme Court, U.S.
FILED

95-841 NOV 29 1995

OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALBERT AKINS, ET AL.,
PETITIONERS

v.

ZENECA, INC.,; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912 INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VOLUME II

PETITION FOR WRIT OF CERTIORARI

Frank Steiner
Counsel of Record
STEINER & STEINER
214 Second Avenue North
Suite 203
Nashville, TN 37201
(615) 244-5063

(LOGO)

October 16, 1990

Mr. Mark Dobbins
ICI Americas, Inc.
Employee Relations Department
Rollins Building, Third Floor
Wilmington, Deiaware 19897

Dear Mr. Dobbins:

Re: Qperating Engineers Local 912
v. Rhone-Poulenc and ICI

In accordance with my telephone conversation on Tuesday with Janell Taylor in your office, enclosed please find a copy of the complaint which I am filing on behalf of Local 912 of the Operating Engineers. As I explained to Ms. Taylor, I consider this to be

a "friendly" lawsuit in which I am asking the federal court to determine the validity of the September, 1982, memorandum of agreement. As you are aware, Rhone-Poulenc is closing its facility in Mt. Pleasant, and the Rhone-Poulenc employees who are eligible have requested that they be allowed to transfer to ICI and bump less senior employees. It is my understanding that ICI has taken the position that they will not allow this to happen, and I believe the only alternative for us is to ask the court to determine whether that contractual provision is valid. Unquestionably, the Operating Engineers are in an uncomfortable position over this, as they represent the employees at both facilities.

If you would care to discuss this matter further, please don't hesitate to contact me. Also, if you have any thoughts or questions

concerning the complaint, I would be more than willing to discuss it with you.

With best regards, I am

Sincerely yours,

/s C. Dewey Branstetter, Jr.
C. DEWEY BRANSTETTER, JR.

CDBjr:kac
dobbins.ltr

(LOGO)

December 12, 1990

VIA TELEFAX

C. Dewey Branstetter
Branstetter, Kilgore, Stranch
& Jennings
200 Church Street
Fourth Floor
Nashville, Tennessee 37201

RE: Local Union 912 v. Rhone-Poulenc Basic Chemical Company and ICI Americas Inc. - Case No. 1-90-0160

Dear Mr. Branstetter:

This letter will outline some of the thoughts presented by Julie Manning and myself on behalf of ICI Americas Inc., ("ICI") at our December 5, 1990 meeting.

As we indicated, ICI is ready to defend this lawsuit and we feel comfortable that the suit would be dismissed if we ask the Court to do so. Before ICI invests time and money in pursuing depositions and its Motion to Dismiss, however, the Company was interested in exploring whether there might be a way of resolving the case in a fashion beneficial to all. We suspect that business changes about to occur regarding the Mt. Pleasant Organic Plant present an opportunity for a resolution by which everyone wins, and that was the focus of our discussions at the December 5 meeting. We wish to reiterate that our discussions on December 5 and this letter constitute settlement discussions which are inadmissible in any legal proceeding in any forum.

To summarize ICI's proposal, we suggested that contract negotiations between ICI and Local 912 be opened now, with ICI's workers

thereby receiving an increased economic package earlier than they otherwise might receive such benefits. Coupled with this could be an agreement on a preferential hiring arrangement whereby laid off Rhone-Poulenc workers meeting agreed qualifications would be given first chance to fill new ICI jobs as the Mt. Pleasant Plant grows in the future. Of course, part of negotiations would be deletion of any reference to the September 13, 1982 Memorandum of Agreement as well as the other obsolete side agreements.

Let me reiterate the reasons why we expect that Judge Higgins, if asked, would dismiss the lawsuit [and refuse to give Local 912 any opinion as to whether the September 13, 1982 Memorandum of Agreement is enforceable]. First, as I am sure the Union knows, the collective bargaining agreement expressly requires the Union to follow the

grievance procedure and complete the arbitration process as to all disputes relating to interpretation of the contract...No grievance can be filed at this point because there is nothing to grieve. No layoffs have occurred and, as Rhone-Poulenc has now stated in its Answer, it has not even decided on any time frame for any layoffs to begin.

Second, the lawsuit would be dismissed for the additional reason that the law regarding declaratory judgments requires that there exist an actual "controversy" between the parties, and none exists here. The Union's suit does not claim that the September 13, 1982 document is enforceable against ICI, nor does it not ask the Court to rule that, if Rhone-Poulenc's plant closes, its employees have the right to put ICI's workers on the street. Rather, the suit improperly asks the

Court to give the Union advice as to whether the 1982 document is valid. Thus, the only controversy revealed by the complaint is one between the Rhone-Poulenc employees and the ICI employees, both of which groups the Union is supposed to represent. Unless and until the Union files in court a document claiming that the ICI employees (who the Union represents) should lose their jobs to laid off Rhone-Poulenc workers, there is no controversy between ICI and Local 912, and the case must be dismissed. We believe there is a serious question as to whether the officers of Local 912 are really ready to state in writing that ICI's workers should be put on the street in order to make way for laid off employees with lesser skills who are employed by <u>another company</u>.

Third, the law clearly provides that Judge Higgins has no jurisdiction over this

Section 301 lawsuit, because the Union has improperly asked the Court to decide the validity of the 1982 document. Section 301, under which the suit was filed, only permits courts to decide whether a collective bargaining agreement has been violated by a party. Until the Union files a public document with the Court claiming that a refusal to throw ICI workers out of their jobs will violate the contract, the Court has no authority to hear the lawsuit. Of course, Local 912's representatives also would need to testify that they believe the ICI employees should be forced to give up their jobs to employees from Rhone-Poulenc if Rhone-Poulenc's plant closes.

Fourth, we think that the several depositions we intend to take will establish that the Union is unable to prove any likelihood that a sufficient number of Rhone-

Poulenc workers will be laid off before the collective bargaining agreement expires next June, to cause the September 13, 1982 Memorandum of Agreement to come into play. In this regard, please note that paragraph 11 of Rhone-Poulenc's Answer "denies that it has announced a specific date on which it plans to begin laying off employees from the Furnace Plant." Because the Union will be unable to show that the enforceability of the 1982 document will come into question prior to June, the case is not a proper declaratory judgment action and must be dismissed.

Of course, because the September 13, 1982 document will not be in effect if and when Rhone-Poulenc lays off a sufficient number of people, pursuit of this lawsuit will result in Rhone-Poulenc workers getting nothing whenever they are laid off.

This brings me to the reason why we believe certain business changes at ICI offer an opportunity for the parties to reach an agreement now that will place ICI's workers, Rhone-Poulenc's workers, and Local 912's officials in a <u>better</u> position than they will be in if this lawsuit continues. We do not think it is in anyone's interest to let this opportunity pass and have everyone end up with nothing but expensive bills from their lawyers.

The opportunity for us to reach a mutually beneficial agreement arises from the fact that the ICI Specialties business group will be taking over the Mt. Pleasant Organic Plant as of January 1. The advent of Specialties business group control will mean eventual implementation of the Total Quality Commitment ("TQC") program that Julia Manning outlined at our December 5 meeting. Some of

the highlights of the TQC program are Process Improvement Teams, Steering Committees comprised of labor and management representatives, substantial operational input from the workforce, and expected significant decreases in incidents of employee discipline and grievances.

Successful implementation of TQC requires a significant management-labor culture change, and it is in ICI's interest to begin that process early by entering into early negotiations with the Union. Early opening of negotiations will also allow ICI employees to immediately obtain enhanced economic benefits that they would not otherwise be in a position to receive until after the current contract expires next June.

While negotiations obviously must result in elimination of any reference to the

September 13, 1982 Memorandum of Agreement, as well as the other obsolete and unenforceable side agreements, ICI is prepared at the same time to negotiate a preferential hiring arrangement whereby laid off Rhone-Poulenc workers, meeting agreed qualifications, would be hired at the Organic Plant as the Specialties group creates new employment opportunities in the future.

To summarize, we believe that if Local 912 continues its lawsuit, the result will be as follows:

1. The lawsuit will be dismissed;

2. Local 912 will have substantial legal expenses;

3. Rhone-Poulenc employees, if and when they are laid off, will have nothing;

4. ICI employees will be angry with Local 912 representatives for pursuing an action designed to force them out of their jobs; and

5. Rhone-Poulenc employees will be angry with Local 912 representatives for giving up the chance to obtain preferential hiring rights with ICI.

On the other hand, the results of an arrangement in the form outlined above will be:

1. Rhone-Poulenc employees will obtain valuable preferential hiring rights with ICI, whose Mt. Pleasant facility is expected to grow;
2. ICI employees will end up with enhanced economic benefits several months earlier than they otherwise might receive such benefits;
3. Rhone-Poulenc employees will recognize that Local 912 has placed them in a better position than they were in with the lawsuit pending;
4. ICI employees will be grateful to Local 912's representatives for getting them better economic benefits and early implementation of the Total Quality Commitment program; and
5. The Union saves substantial legal expenses.

In light of these factors, we recommend that your client seriously consider ICI's proposal. My instructions are to seek an early response and, absent meaningful progress toward agreement, to aggressively pursue dismissal of the lawsuit.

Finally, we want to stress that nothing in this letter, prepared strictly for settlement purposes, should be construed as a concession by ICI that the September 13, 1982 Memorandum of Agreement is enforceable. It remains ICI's position that the document is unenforceable, and we believe the Court would reach the same conclusion.

Very truly yours,

s/Cary Schwimmer
CARY SCHWIMMER
For YOUNG & PERL, P.C.

CS:krp
cc: Julia Manning, Esq.

FAX TRANSMISSION

TODAY'S DATE: 7/10/91 TIME: 1:35

NO. OF PAGES 10

TO: General President

LOCATION: Washington, D.C.

FAX NUMBER: 202-429-0316

TELEPHONE NUMBER:

COMMENTS: Please respond no later than 7/12/91

FROM: Waylon Carroll/Terrance Nevette

LOCATION: Mt. Pleasant, TN

FAX NUMBER: 615-379-1456

July 10, 1991

General President
International Union of Operating Engineers
1125 Seventeenth Street Northwest
Washington, DC 20036

Dear General President:

We, the members of IUOE Local 912 are concerned about whether our interests were represented by our Union Representative, James Kincaid. We feel that we have been misled as well as misrepresented. In the 1982 agreement, a clause was added concerning roll-back rights between the two plants. At the time, both plants were Stauffer Chemical Company. Since, the plants have been sold several times and are now owned by ICI (Organic) and Rhone-Poulenc Chemical Company (Furnace).

We feel that Local 912 has a conflict of interest by representing both plants. We were told by Mr. Kincaid, at the May 1991 meeting that we had an uphill battle, because ICI wanted the roll-back clause taken out of their contract. We were also told by Mr. Kincaid and Mr. Dewey Bransetter, from the Union's Law Firm, that removal of the clause would not

affect us. On June 11, 1991, contract deadline at ICI, the roll-back clause was the key issue. After which, the attorney for Local 912 withdrew the request for a court ruling which had been scheduled for October 15, 1991, on said agreement.

In June we had a meeting with our Union Steward. We discussed the opening of the RP Basic contract. He was asked not to open before deadline by several members. Charles Morton, Chief Job Steward, asked that the contract be opened, at which time, Mr. Kincaid said there was a 60-day deadline. We feel that the best interest of those concerned, was not taken into consideration. In further discussion, Mr. Kincaid read a letter from the Union Law Firm, informing members that the case would be dropped. Mr. Kincaid further stated that individual members should seek legal representation. He was then asked for a

copy of the letter from the law firm, but he refused.

On June 28, 1991, the RP Plant will cease operation. The plant was originally scheduled to cease operation in February; but the plans were changed. On July 5, 1991, approximately 130 people were laid off. Several of these are eligible to roll-back to ICI, according to the 1982 contract. On July 8, these seven will attempt to exercise their rights to roll-back at the personnel office of ICI. We believe there are 50 or 60 more members who are eligible to roll-back rights, who will not be laid off until the second lay-off, scheduled for sometime around the first of 1992.

We would appreciate anything you could do for us, as our union seems to be working against our best interest. There are many

people who have worked at the plant 10-35 years, who will be left with nothing. We have enclosed our Second Stage Grievance against both ICI and Rhone-Poulenc.

Sincerely,

Terry Nevette/Waylon Carroll

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL UNION NO. 912
(LOGO)

July 16, 1991

Mr. Frank Hanley, General President
International Union of Operating
Engineers, AFL-CIO
1125 17th Street, N.W.
Washington, D.C. 20036

Dear Sir and Brother

Re Your letter addressed to me dated 11 July, 1991 and a copy of correspondence from Local 912 Members Terry Nevette and Waylon Carroll, regarding representation in their Local (Local 912) Union

In your letter addressed to me, dated July 11, 1991, you requested I submit a report to your

office concerning the subject matter referenced above by Local 912 members Terry Nevette and Waylon Carroll in a letter to you by Fax Transmission dated 10 July 1991, wherein the two members stated:

> "...We the members of IUOE Local 912 are concerned about whether our interests were represented by our Union Representative, James Kincaid, (sic). We feel that we have been misled as well as misrepresented."

In substance the disgruntled members have three complaints: One, the roll or bumping issue and the alleged conflict of interest by Local 912, IUOE, representing both plants in the controversy; two, the Union's refusal to give a copy of its attorney's letter withdrawing its "Declaratory Judgment Suit" to one or more of the disgruntled members; and,

three, the opening of Rhone-Poulenc's (the old Stauffer Furnace Plant) contract with Local Union 912, which expires 15 August 1991.

As to the first complaint, on June 26, 1990, I, James B. Kincade, wrote you a letter (copy enclosed, numbered Document #1) explaining the dilemma that Local 912 faced requesting your interpretation and counsel in the matter. On 27 July 1990 you responded by letter, a copy of which is attached to my June 26 letter. In addition, I have talked with Richard Griffin and Helen Morgan in IUOE's legal department as to the general problem involved.

After talking with Dewey Branstetter, Jr. of the Nashville Law Firm of Branstetter, Kilgore, Stranch and Jennings, it was decided that the proper route to go was with a Declaratory Judgement lawsuit, a copy of which is attached and numbered as document #2. This

suit was filed on October 16, 1990. It is self-explanatory.

The cessation of Rhone-Poulenc's operation was delayed by its top management from January 1, 1991 to July 5, 1991.

ICI's contract by its term expired 11 June 1991. And as was feared by Local 912, ICI took a firm position that the Memorandum of Agreement dated 13 September 1982 (bumping between the two plants) be deleted from its contract. Local 912's negotiating committee, which was empowered to accept or reject, was personally opposed to deleting the Memorandum. However, the committee recognized that deleting the controverted memorandum was not a strike issue with ICI's employees and Local 912's members, therefore, the Memorandum was negotiated out and was deleted from ICI's contract. I did not feel that this would

nullify the 1982 memorandum Agreement (Bumping) however, because of the third-party rights involved - the rights of Rhone-Poulenc's employees and also 912's members.

Attorney Dewey Branstetter contended that taking the memorandum out of ICI's contract before the fact of the plant lay-off at Rhone-Poulenc now rendered the controversy moot. (See Branstetter's letter to me dated 14 June 1991, numbered document #3.) Branstetter recommended Local 912 dismiss its suit, which I did. This was not done hastily. I questioned him extensively as to what 912 could do if the suit was withdrawn. The other remedies he mentioned are set-forth in his letter. He was not optimistic about prevailing with a NLRB charge. Nor was he optimistic about prevailing in the grievance route. He seemed to feel that the best route

was an individual law suit arguing vested interest, but the chances here were slim.

At Local 912's July regular membership meeting with Rhone-Poulenc's employees there was much controversy, disagreement, and disgruntlement about the issue. Someone had called a reporter from the Local newspaper that came to the meeting. He was requested to leave, which he did. I read the letter from Attorney Branstetter to the assembly. Several wanted a copy of the letter; which request I denied, citing IUOE's Constitution that what we did was to remain inviolate and private from persons outside the Organization. I cited the fact that a reporter had been notified by someone. I, also, learned later that one of Nashville's television reporters had been invited. The reporter could not find the meeting hall until after the meeting was over.

As to the second complaint, I did agree to let any interested member come to the Union Hall's office and review the attorney's letter, but not copy it. I further agreed to cooperate with any individual's attorney, if such individual wanted to pursue an individual lawsuit.

Although I recommended the members not go the grievance route in the controversy, because of the obstacles apparent, I drafted the written grievance for them, requesting they wait until the lay-off occurred before grieving. (The grievance was attached to Nevette's and Carroll's letter faxed to you dated 10 July 1991.)

The problems with the grievance route are many and gets back into the legal arena. One question is obvious. Suppose Rhone-Poulenc grants the grievance! How can Local 912 make

ICI take the employees from Rhone-Poulenc. If Local 912 goes to court in an effort to do so, where does that leave Local 912 with its members at ICI as to fair and proper representation? This is one of the dilemmas I discussed with Branstetter, our attorney. This is one of the reasons he recommended against the grievance route.

Local Union 912 has certainly not been arbitrary, discriminatory, and/or capricious in this matter. Lack of satisfaction certainly does not mean lack of representation. I have sought guidance from your office and IUOE's legal department as well as Local 912's Attorneys. Any route 912 goes there is disagreement. It's just a question of whose ox is getting gored.

As to the third problem - the opening or not opening of the contract, Local 912's contract,

by its term expires 15 August 1991. Local 912 has never had or called a meeting as to whether to re-open the contract. I and some others recognized our reduced bargaining power with the scheduled shut down of the plant. However, since the cessation of operation and lay-off was to be in phases - the second phase in January of 1992, of some eighty (80) more, and a remainder of some 30 to 40 for 4 to 8 years, I told the members in our May' 91 meeting, after discussing the pros and cons of the opening or not opening the contract, that I intended to open it. I had three or four calls opposed to the opening of the contract, but that was the extent of the manifested opposition.

The allegation that "... our Union seems to be working against our best interest..." is not factual. Local 912 is doing everything that it knows to do with the dilemma it is

confronted with. As stated earlier, I have sought counsel from your office; used my twenty-three years of knowledge and experience, and have sought and obtained legal counsel in an effort to resolve this issue of bumping and/or rolling between the now two separate entities. Some two hundred plus are going to ultimately lose their jobs. The want to displace more junior employees at ICI as per the 1982 Memorandum of Agreement negotiated when the two entities were one company - Stauffer.

The question, and issue, is: Can the Rhone-Poulenc employees (Old Stauffer Furnace Plant), and now Local 912 members, bump under the 1982 Memorandum of which the Organic was a party to, (now ICI Americas) after all that has transpired and change - the deleting the Memorandum from ICI's contract by 912 members?

Our attorney, Branstetter says the chances are slim and none. He did not think Local 912 could prevail under any of the three routes he mentioned: the grievance route, the Board charges, and the individual law suit. My Assistant, Thomas Alexander, talked with a local attorney here in Columbia and he, in general, concurred with Branstetter.

Local 912's position has not changed. Local 912 knows what the intent and objective of the 1982 Memorandum was. It is the changing of time and events that has caused the problem of gaining the objective of bumping under the 1982 memorandum. (Copy enclosed, designated document #4.)

Legal questions are now involved of which there is not sufficient case law to guide us, according to our attorneys, in an effort to force ICI to take the Rhone-Poulenc employees

after ICI negotiated the Memorandum out of its contract. Our members who are disgruntled who work at Rhone-Poulenc think that Local 912 can just wave a magic wand and effect the bump, regardless of all that has transpired.

As stated in my letter to you of June 26, 1990 the Union is in a no-win situation. we are "damned if we do, damned if we don't."

Local 912 intends to do the best it can with the situation. If you have any suggestions as to how to equitably resolve the dilemma, please advise.

Brothers Nevette and Carroll included a copy of the Severance Agreement negotiated between the Parties prior to the first lay-off, and a copy of the 1982 memorandum, which I have enclosed.

It is note-worthy that neither Nevette or Carroll were effected in the first lay-off (see documents 5 and 6). Nevette told me over the telephone that he would not attempt to bump to the ICI plant were there no controversy.

I have enclosed three other documents which are self-explanatory - documents 5, 6, 7 and 8.

I trust the foregoing is sufficient for you to understand the controversy and dilemma. If not, please advise.

Fraternally,

/s James B. Kincade
James B. Kincade
Business Manager

JBK/fr

Received Aug - 7 1991

(INTERNATIONAL UNION OF OPERATING ENGINEERS)
(LOGO)

Office of General President . (202) 429-9100

EXHIBIT
NO. 27
Karl Hall 5-27-92
Court Reporter

August 5, 1991

Mr. Terrance Nevette

No. 1 Redwood Subdivision

Columbia, TN 38401

Dear Sir and Brother:

Reference is made to the unsigned facsimile letter of yourself and Brother Waylon Carroll forwarded to this office on July 12, 1991 concerning your roll back rights under applicable bargaining agreements entered into between your employer and IUOE Local Union No. 912.

After reviewing this matter, I have determined that the referenced agreements were entered into by the Local Union as exclusive bargaining representative for the respective bargaining units, and that the International Union is not a party to those agreements. Accordingly, the International Union is without authority to alter or amend the terms of those agreements nor intervene in the subject matter of your letter. Be further advised, however, that it appears that Local Union No. 912 has acted vigorously and in good faith in this matter to protect the interests of all members covered by the applicable collective bargaining agreements.

Fraternally yours,

Frank Hanley
General President

FH:glt

cc: Business Manager, Local 912
Regional Director
Waylon Carroll

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL UNION NO. 912

(LOGO)

September 27, 1991

Mr. Paul Pruett, Plant Manager

Rhone-Poulenc

P.O. Box 472

Mt. Pleasant, Tennessee 38474

Dear Mr. Pruett:

Re: GRIEVANCE NO. F91-13

The Union will withdraw the above-referenced Grievance.

Yours truly,

Thomas Lee Alexander

TLA/fr

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL UNION NO. 912

(LOGO)

September 30, 1991

Mr. Waylon Carroll

Route #1, Box 264

Summertown, Tennessee 38483

Dear Sir and Brother:

Re Bumping Controversy Grievance
Designated F91-13, Dated 8-22-91

This letter is in response to your question as to the status of the subject-grievance.

Based on our previous discussions, the obstacles to overcome, the legal questions involved, and the legal opinion of our Attorney, C. Dewey Branstetter, Jr., (a copy of whose letter is enclosed, dated 9-9-91) and

the Memorandum of Agreement dated 13 October 1988 (a copy of which is enclosed), the Union is discontinuing the grievance.

If you have any further questions, please call or come by the office.

Fraternally,

/s James B. Kincade
James B. Kincade
Business Manager

JBK/fr

...

Q And what did Mr. Kincade continue to tell you?

A He kept telling us that they could not affect us. If they voted it out of their contract, they could not vote ours away.

...

Q Mr. Carroll, if you had known ultimately, looking back, if you had known that the ICI employees deleting that from the contract, deleting the cross bumping portion from your contract would have affected your rights what would you have done?

A The first thing that we would have done was wanted a committee, our committee in on those meetings, and to represent our behalf. And if they had ever tried to vote it out, they couldn't because we had 250 members. They had a hundred twenty-

five. It just wouldn't have come out there.

Q The ICI contract of 1991, was that ever submitted to you or the employees at Rhone-Poulenc for approval?

A No, ma'am.

Q Do you think it should have been?

A Yes, ma'am.

...

Q The fact that the ICI and Local 912 bumped or deleted the cross bumping agreement from their '91 contract, do you feel that affected your rights?

A Yes, I do.

...

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBERT AKINS, ET AL., Plaintiffs,	)	
v.	)	CIVIL NO. 1-91-0134
	)	(JUDGE HIGGINS)
ICI AMERICAS INC., ET AL., Defendants.	)	(JURY DEMAND)

AFFIDAVIT OF TERRANCE NEVETTE

I, Terrance Nevette, first being duly sworn, state as follows:

1. I am a Plaintiff in this action. After the execution of the 1982 cross-bumping agreement, the Union officials, including Mr. Kincade, regularly informed members of both bargaining units that one bargaining unit could not affect the rights of the other bargaining unit under the cross-bumping agreement. When we became concerned in 1991 that ICI and the bargaining unit for the organic plant would attempt to destroy our rights, the Union officials continued to

inform us that we did not need to be concerned because the other bargaining unit could not affect our rights.

2. The Union meeting for the bargaining unit for the furnace plant was scheduled for the second Monday of each month. The Union canceled our meeting which was scheduled for June 11, 1991. The meeting was rescheduled and held on June 18, 1991. At that time, the Union officials, through Mr. Kincade, informed us for the first time that in their opinion, our one time transfer rights had been terminated by the June 11, 1991, contract agreed to by ICI and the bargaining unit for the organic plant. Mr. Kincade also informed us at that meeting that the declaratory judgment action had been dismissed. This was the first knowledge that the members of the bargaining unit for the furnace plant had that the declaratory judgment action was even being considered for

dismissal. Mr. Kincade also read Mr. Branstetter's letter of June 14, 1991, to the members (Exhibit 15 to Kincade deposition). However, he refused to give us a copy of that letter.

3. After the Union meeting of June 18, 1991, I called Mr. Branstetter concerning his letter and the declaratory judgment action. Mr. Branstetter refused to furnish me any information. He told me that he represented Mr. Kincade and that there was a conflict of interest between Mr. Kincade and me. I asked him whether there was a conflict of interest between the bargaining units for the organic plant and the furnace plant but he refused to discuss it with me.

4. I have also read on this date the letter dated December 12, 1990, from ICI to Mr. Branstetter. Neither I nor to my knowledge any member of the bargaining unit for the furnace plant was ever notified of the

information in that letter concerning the possibility of settlement on a priority hiring basis. We had no knowledge of this letter until it was produced in this action.

FURTHER AFFIANT SAITH NOT.

/s Terrance Nevette
TERRANCE NEVETTE

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to and subscribed before me on this 7th day of October, 1992.

/s Carrie A. Plowman
NOTARY PUBLIC

MY COMMISSION EXPIRES:

May 22, 1993

91053AF2

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBERT AKINS, ET AL., Plaintiffs,	)	
v.	)	CIVIL NO. 1-91-0134
ICI AMERICAS INC., ET AL.,	)	(JUDGE HIGGINS) (JURY DEMAND)
Defendants.	)	

AFFIDAVIT OF DAVID PALEY

My name is David Paley. I am one of the Plaintiffs in this action and I was employed at the phosphate plant from February 3, 1975, until laid off on September 27, 1991.

I was a member of the negotiating committee with Rhone-Poulenc Inc. for the October, 1988, Collective Bargaining Agreement applicable to the phosphate plant. Throughout these negotiations, we made clear to Rhone-Poulenc Inc. that we would not agree to any changes in the Memorandum Agreement of September 13, 1982.

Proposal A, submitted by Rhone Poulenc Inc. (Plaintiffs' Exhibit 2), would have amended the September 13, 1982, agreement to prohibit ICI Americas Inc. employees from the organic plant displacing or exercising seniority over employees of Rhone-Poulenc Inc., including the Plaintiffs. We rejected that proposal.

Proposal B (Plaintiffs' Exhibit 3), submitted by Rhone-Poulenc Inc. would have amended the September 13, 1982, agreement to provide that employees of the phosphate plant who sought to exercise their seniority at ICI Americas Inc.'s organic plant, relied solely on the commitment of ICI Americas Inc. to the September 13, 1982, Memorandum Agreement. Proposal B further provided that Rhone-Poulenc Inc. would not be responsible to its former employees in such efforts nor would there be any other remedy against Rhone-Poulenc Inc. We rejected Proposal B.

We insisted that the September 13, 1982, Memorandum Agreement not be changed. In acceptance of this condition, Rhone-Poulenc Inc. then submitted the memorandum dated October 13, 1988. It was the understanding of the parties and the meaning of the agreement that employees who were not covered under the September 13, 1982, agreement, would be laid off under Article VIII of the Collective Bargaining Agreement and that the employees covered by the September 13, 1982, Memorandum Agreement would be laid off under the terms of the September 13, 1982, agreement. Under the September 13, 1982, agreement, employees acquired transfer rights only after they exhausted their rights under Article VIII of the Collective Bargaining Agreement.

In the final 1988 Collective Bargaining Agreement, the Memorandum Agreement of September 13, 1982, was expressly incorporated without change. (Article XVII,

Section XI, p. 47 - Exhibit 2, Pruett Affidavit.) In the subsequent Rhone-Poulenc Inc. Collective Bargaining Agreement for 1991, the Memorandum Agreement of September 13, 1982, was again expressly incorporated without change and is presently in effect.

The Memorandum Agreement of April 19, 1991, including the waiver of obligations and liabilities form (Exhibit 3, Pruett Affidavit), related to separation pay. Neither the agreement nor the waiver designated the Memorandum Agreement of September 13, 1982, as being released nor did they make any specific reference to claims under the Age Discrimination in Employment Act. No amount was included in severance pay for the release of transfer rights under the Memorandum Agreement of September 13, 1982.

Numerous employees were laid off who were not covered by the Memorandum Agreement of September 13, 1982. The

severance pay for these employees was computed in the same manner as Plaintiffs' severance pay. Certain of the employees receiving severance pay, who had no transfer rights under the Memorandum Agreement of September 13, 1982, had equal or greater seniority to some of the Plaintiffs. All of the terminated employees received severance pay computed in the same manner.

I accepted separation pay. At the time of my acceptance, the Defendants, ICI Americas Inc. and Rhone-Poulenc Inc., were refusing to honor Plaintiffs' contractual transfer rights.

At Plaintiffs' insistence, the Union pursued a grievance to Rhone-Poulenc Inc. concerning the transfer rights through the second step of the grievance procedure. Rhone-Poulenc Inc. denied the second step grievance. Plaintiffs insisted the Union pursue the grievance further but the Union

unilaterally withdrew and discontinued the grievance.

Under the grievance procedures of the Collective Bargaining Agreement, the Union had the sole right to pursue the grievance after the employee complaint. There is no provision in the contract authorizing individual employees on their own to pursue their grievances to the third step and higher. There was no internal Union remedy remaining to Plaintiffs to contest the Union's actions.

Rhone-Poulenc Inc. announced in June of 1990 that it would begin layoffs in February of 1991. On December 6, 1990, the Defendant, Rhone-Poulenc Inc., in its answer to the Union's suit, indicated for the first time that layoffs may not begin as planned.

/s David Paley
DAVID PALEY

STATE OF TENNESSEE)

COUNTY OF LEWIS)

Sworn to and subscribed before me this 7 day of Mar. 1992.

/s W. L. Gilbreath
NOTARY PUBLIC

MY COMMISSION EXPIRES:

11-4-94

91053AF

...

DAVID E. PALEY,

after having been first duly sworn, testified as follows:

...

Q Did you work in the furnace plant during the entire time of your tenure at Stauffer or later at Rhone-Poulenc?

A No, sir. I worked for the furnace plant for about six months and went to the organic plant. I worked there, I guess five or six years, and transferred back up to the furnace plant where I was laid off from.

...

Q Did you have any discussion with Mr. Kincaid after you got the June 20, 1990, letter as to whether the union thought you would be able to force ICI to accept furnace plant employees?

A He told us that the Memorandum of Agreement was in effect and it was -- they

would have to abide by it. No matter what they said, it was in writing and it was a contract that we had and that they would have to honor it.

...

Q ...mentioned your complaint here alleges that there was a conspiracy. You understand that?

A Yes, sir.

Q Do you believe there was a conspiracy?

A Yes, sir.

Q What is your basis for believing that any representative of any defendant got together with a representative of another defendant in order to plan to do anything?

A It just doesn't look like the way everything fell into place would have just fell into place the way it did.

Q Well, tell me what fell into place that you believe would not fall into place absent a plan or scheme to deprive you of your rights?

A There was a judgment -- declaratory judgment filed with the Court. The union stated that it didn't matter what ICI would do in their contract, it would not affect us. Rhone-Poulenc postponed our layoffs until after ICI's contract, when they took this Memorandum of Agreement out of the contract, and then the declaratory judgment suit was dropped the next day after ICI's Memorandum of Agreement was taken out of the contract.

...

Q I want to understand what you mean by postpone. Are you saying that the reason that the layoffs began at a later date than they initially were announced for was because Rhone-Poulenc wanted to allow ICI to get the Memorandum of Agreement out of its contract before layoffs began?

A Yes, sir.

...

Q What is he lying about?

A The union had received a document stating that Rhone-Poulenc had admitted their liability, and it is prior to the dropping of the lawsuit.

Q The union received a document in which Rhone-Poulenc admitted its liability prior to the dropping of the lawsuit?

A That's what Lee Suydam says.

Q Lee Suydam said that the union received a document where Rhone-Poulenc admitted its liability before the lawsuit was dropped?

A Yes, sir.

Q What document was he talking about?

A It was an interoffice correspondence prior to the 1988 Agreement.

...

Q You are talking about Mr. Kincaid lying and something about a document. I want to know how that translates into the union, meaning Local 912, getting together with any

other defendant in order to plan to do anything.

A I don't know, but the lawsuit was dropped the day after the organic contract was signed.

Q But you have been told that the union's attorney advised that that's what should be done?

A That's what I was told, yes.

Q You believe that the local's decision to follow its attorney's advice is evidence of a conspiracy. Is that correct?

A That's part of it, yes, sir.

Q What else is there that you believe is evidence of a conspiracy?

A The timing of it.

Q The timing of the dropping of the lawsuit the day after --

A After the contract was signed, the layoffs were postponed until the contract was signed.

...

Q Have you offered to give the severance pay back to Rhone-Poulenc?

A If I go to work, I will give it back to them.

Q Have you told them?

A No, sir. I haven't got a job yet.

Q To this moment, have you told anyone if you got a job at ICI, you would give the severance pay back to Rhone-Poulenc?

A I'm sure I have.

Q Do you know who you told?

A I think I told Waylon.

Q Anyone else?

A My wife.

Q Anyone else?

A I'm sure I have.

Q Have any of the plaintiffs in this case, to your knowledge, offered to give their severance pay back to Rhone-Poulenc if they got a job at ICI?

A The ones I have directly asked them.

Q Who?

A Waylon is one.

Q Waylon who?

...

Q Did anybody talk about the September 13, 1982, document you are relying on?

...

Q What was stated?

A That it was legal and binding and the lawsuit should have never been dropped to get to the declaratory judgment, I think is what you call it.

Q Did anybody say why this is legal and binding?

A It's in black and white. It was agreed to with all the parties. Why would it not be binding?

...

Q And what else did you see or hear or have you heard about how this document came about?

A That's just at the union meetings when they was explaining the contract, and as the committee members come through the plant and explained how the new contract was, that's what they told us. Kincaid, that's the way he explained it to us. If you was ever going to be laid off from one of the plants, you could go to the other plant.

...

Q At any time that you have been told about how it came about.

A Well, since then, since the company separated and since the plants separated and now they are owned by two different companies, Mr. Kincaid stated time and time again that it was still binding, it didn't matter what the organic plant did with their part of the agreement, that we still had ours and we could go to the organic plant if we got laid off. That was kept in our contract.

...

Q In the complaint, it is alleged that in May of 1991, the local union informed employees at the phosphate plant that ICI was demanding the deletion of the September 13 Memorandum of Agreement, but it would have no effect on the employees at the Rhone-Poulenc plant. Did someone tell you that?

A Yes, sir.

Q Who told you that?

A Mr. Kincaid.

Q When did he tell you that?

A Time and time again.

Q Give me a specific date, if you remember.

A He stated it at the union meetings, he stated it at the negotiations for the severance package, he stated it at the negotiations for the drug abuse policy, he stated it at the meetings we had setting up an apprentice program. Any time the subject came up, that's what he told us.

Q And did he tell you that that would have been true if employees had been laid off prior to the time that that language was deleted from the ICI contract?

A No, sir. He said that the language in the ICI contract had no bearing on what happened to our contract.

Q Do you know whether he had sought legal advice and an opinion on the validity of what he was telling you prior to June of 1991?

A The union was paying you big bucks. I don't know why you wouldn't have told him.

...

Q When were you first informed that the Rhone-Poulenc employees no longer had transfer rights?

A It was the Monday after the negotiations was settled with ICI, the meeting Mr. Kincaid couldn't remember, is when he told us that he dropped the lawsuit and that we had no other rights.

...

Q There is nothing Rhone-Poulenc could have done to force them to take you, is there?

A No, sir, I don't agree with that.

Q Why do you not agree with that?

A Rhone-Poulenc could have taken other action to see that we were employed with ICI.

Q What other action are you saying that Rhone- Poulenc could have taken?

A They could have gone through the Courts.

Q So it is your statement, then, that it was Rhone-Poulenc's duty to file a lawsuit to get you a job at ICI?

A Yes, sir, or whatever it took.

Q And is that part of what you claim to be a breach of the union's duty, also, that the union didn't take steps to force ICI to take you?

A Yes, sir, or the union, too, when it didn't -take some action to force Rhone-Poulenc to try to force ICI to take us.

Q Did any lawyer ever tell you that's what the local union should have done?

A It's in our contract they have to uphold the contract, and they didn't uphold it, but to answer your question, no, I haven't talked to an attorney other than Mr. Steiner.

Q Is it your position that the June, 1991, Collective Bargaining Agreement that ICI has with Local 912 is void if it attempts to delete the September Memorandum of Agreement from 1982?

A I don't think they had the authority to delete that memorandum from their contract, if that answers your question.

Q Really my question is whether you have an opinion as to whether that deletion was valid or not.

A No, sir, I don't believe it was valid.

Q What do you base that opinion on? A That there's three people involved, and two people

negotiated out a three-party -- two parties negotiated a three-party agreement.

...

Q In the complaint, you allege that the union, Local Union 912, had a conflict of interest in June of 1991. What was that conflict of interest?

A They were representing the employees at the organic plant and they were representing the employees at the furnace plant, and one was going to be let go, and they were representing both parties.

Q What do you think the local union should have done in this situation?

A They should have either followed the contract or really they should have set up another local and had representation from two people.

...

Q Also, in Paragraph 21 of the complaint as amended, you and the other plaintiffs state

that the union breaching its fiduciary duty of trust to the plaintiffs. How was the union breaching its duty of trust to you and the other plaintiffs?

A Telling us one thing and it not being true.

Q What else do you claim was a breach of the union's duty to you?

A Not fulfilling our contract.

Q How did the union not fulfill your contract?

A They dropped the grievance against Rhone-Poulenc. They would not file a grievance with the organic plant.

...

Q Paragraph 23 of the complaint states that the union defendants failed to enforce plaintiffs' vested contractual rights and process valid grievances. How did the local union fail to enforce your contractual rights?

A They dropped the grievance.

Q Other than, as you say, dropping the grievance, what else did the local union fail to do to enforce your contractual rights?

A They didn't represent us in ICI negotiations.

...

Q You allege in the complaint that the local union acted arbitrarily toward the employees of Rhone-Poulenc. What did the local union do that was arbitrary as concerns you and the other plaintiffs?

A They were representing two different people.

Q Is there anything specifically that you state shows that the union treated you or the other plaintiffs in an arbitrary way?

A They wouldn't go on with the grievance against Rhone-Poulenc. They are telling us one thing, and then when it is too late to do anything about it, they tell us, "No, I'm wrong."

Q Is there anything else?

...

Q ...What information do you have that the international union played any role at all in those decisions?

A. They were contacted by the union.

Q. By what union?

A International was contacted by Mr. Kincaid.

Q When was that?

A That was in June of '90, I believe. He wrote a letter asking for help.

Q What was the response?

A "We're not giving you any," is what I gathered from the response.

Q Wasn't the response that you recall from the president saying that this was a matter of collective bargaining, that it was the responsibility of the local union?

A Isn't that the same thing as, "we're not going to help you"?

...

Q Isn't your only information or allegation that the international should have done something about that?

A Yes, sir, I believe they should have done something.

Q What do you base that on?

A Constitution. The international is supposed to see that the local unions uphold the contracts that it's got.

Q That's despite what the general president says?

A I can't help what he says. You asked me what I felt, and that's what I felt.

Q But you don't have any facts to base it on, other than your opinion, do you?

A The constitution.

...

The deposition of MR. JAMES B. KINCADE, a witness called at the instance of the Defendants, for use in notice of evidence in the above-entitled cause, taken pursuant to Rule 26, et seq., of the Tennessee Rules of Civil Procedure, taken on the 27th day of May, 1992, in Nashville, Tennessee, at the office of Mr. Dewey Bransstetter, Jr., Esquire, In Nashville, Tennessee, before Karl A. Hall, Notary Public at large and Court reporter, pursuant to the stipulation of counsel.

...

Q. And didn't you tell the bargaining unit that one unit can't bargain away the rights of the other unit?

A. (Pause.) I, probably, made that statement many times. In my opinion, and under the laws of equity, I felt that it was three parties had reached the agreement and it would take all three parties to negotiate or to negotiate any part of it away. ...

...

Q. Did you also take the position during the 1988 negotiation with I.C.I. where they wanted to say the Memorandum Agreement was in no effect; the bumping agreement? Did you tell them that they have purchased the liabilities as well as the assets? That was your position, in general, wasn't it?

A. Yes, sir.

Q. That that was a liability of that particular plant and they were liable under it with that Agreement?

A. That was my position to Dobbins that when I.C.I. purchased the plant from Uni-Lever, I believe, that they purchased the liabilities as well as the assets. And if that was considered a liability, then they had it, because they had bought it.

...

Q. Now, in the period beginning in 1990, after you received notice that Rhone-Poulenc

was going to have this closing, you told the bargaining unit for the Rhone-Poulenc plant that it didn't make any difference what I.C.I. did, because I.C.I.'s bargaining unit could not bargain away their rights?

A. That's right.

Q. Did you know that Bennie Splain also participated in the 1985 negotiations?

A. I understood that he did. To know it for a fact, no, I didn't know it.

Q. Okay. Did you have any representatives of the International Union in the 1988 negotiations?

A. Yes.

Q. Who was that?

A. Bill Brewer.

...

Q. Did you have any telephone conversations with any member of the International Union in relation to this matter?

A. I talked to a couple of attorneys on the staff in Washington. Richard Griffin, I believe, and, I believe, Helen Morgan. I had called to talked with Mike Fanning and Mike wasn't in. So, I talked to two of his subordinates.

Q. When was this?

A. I don't know. It was after I had written a letter.

Q. Was it before the reply or after the reply?

A. I don't remember whether it was before or after.

Q. From the date of the reply of July 27th, until the date suit was filed, October 16, 1990, did you talk or have any communications with any representative of the International Union?

A. (Pause.)

MR. BRANSTETTER: Frank, what were those dates, again?

MR. STEINER: July 27, 1990, to October 16, 1990.

MR. KINCADE: Did I talk with anybody from the International Union --

BY MR. STEINER:

Q. Yes.

A. Pertaining to the dilemma that I had?

Q. Yes.

A. I probably did. I don't recall. That occupied about 90 percent of my time for a good three months there. And I, probably, did. If I talked with them, I, probably, mentioned it.

Q. And did you tell them you were contemplating this suit? The suit that was filed October 16, 1990?

A. You talking about the Declaratory Judgement suit?

Q. Yes.

MR. BRANSTETTER: To whom was he speaking?

MR. STEINER: Pardon?

MR. BRANSTETTER: To whom was he speaking?

MR. STEINER: He said he was talking to some members of the International Union. Some representatives.

MR. KINCADE: I said, I may have. I don't -- I don't recall, specifically, talking to anyone about it. If I talked with any about anything, it may have come up, you know, what the status of the suit.

...

Q. Mr. Kincade, the question I'm asking you know, and it's for a yes or no answer, did you ever advise the Plaintiffs that there was a possibility of settling the Declaratory Judgement action on the basis of priority hiring?

A. No.

Q. But, if they went to the Organic Plant and didn't qualify, they would be eligible for severance pay, wouldn't they?

A. Yes. In fact, the clause says, "Qualifying for a position at the Organic Plant will make an individual ineligible under this Memorandum, whereas failure to qualify for a position at the Organic Plant will not make an individual ineligible." (Reading.) This is what I've already testified to that was the -- they couldn't get their layoff allowance if they placed themselves under the Memorandum.

Q. But, they had the right to do either one?

A. Yes.

Q. Under --

A. In April, at that time.

Q. They had the right to pursue their job at the Organic plant, also, and the, if they didn't qualify, they would get severance pay?

A. Right. This was in April of '91.

Q. And that was put in especially because of the cross bumping agreement?

A. There was a lot of discussion about the severance and those who placed themselves, I think, the committee was in complete agreement that if an individual placed themselves under the Memorandum, then he was ineligible for severance.

Q. But, that --

A. If he didn't, then he ought to be eligible for it.

Q. But, that clause was put in just because of the bumping agreement?

A. It was because of the bumping agreement, yes.

...

Q. Do the union members pay dues?

A. Certainly.

Q. How much are they?

A. Seventeen, seventy-five, currently.

Q. How much of heat goes to the International?

A. Six dollars.

Q. Is that each month?

A. Each month.

Q. So, out of the dues you receive, you send six dollars for each member?

A. That's correct.

...

Q. During the 1988 negotiations with both I.C.I. and R.P., it was your position that they were successor and fully bound by this Memorandum of cross bumping agreement of September 13, 1982?

A. That's correct.

Q. And once they signed the 1988 agreement, both of them, you didn't have any question that they were a successor and bound by those two agreements, did you?

...

A. It was my contention that I.C.I. had the liability, if that's the way you want to term it, to honor the Memorandum of Agreement.

Q. They were a successor under --

A. That was my contention. They were a successor.

Q. And bound by the contract?

A. Right. They had bought the assets as well as the liabilities.

The Deposition of

ROBERT R. FARMER

...

Q Did you understand that by accepting severance pay and signing that waiver that employees were releasing all claims that they had against Rhone-Poulenc except for workers compensation and unemployment compensation claims?

A And the roll to the organic plant.

...

Q Mr. Farmer, show me where it excepts in paragraph B of III, where it says, "releases any and all obligations and liabilities," where it excepts any rights to roll.

A Well, it's under the terms of this Memorandum of Understanding.

...

Q So you're referring to the paragraph that says --

A Qualifying for a position with the Organic Plant will make an individual ineligible.

Q "Under this Memorandum, whereas failure to qualify for a position at the Organic Plant will not make an individual ineligible"?

A That's how I understand it.

...

Q Explain to me why it would be an easier way out for the union?

A Well, they had a conflict of interest that had been going on since the plants split, so they didn't have any way to get out of this conflict of interest unless this was delayed long enough to get it out of one of the contracts.

...

Q Do you have anything else that you can add to the answer that he gave as to why he thought Local 912 had failed to fairly represent you and the other plaintiffs?

A Well, the best I remember, in December of '90, they got a letter from ICI saying they'd give us preference hiring or something. Well, we never knew anything about that. Plus we never knew anything that was going on. Nobody ever told us nothing about none of that.

...

Q And you were not covered by the collective bargaining agreement between Local 912 and ICI?

A Yeah, I was still covered under it.

Q In what way were you covered under it?

A Because they removed my third-party rights without even conferring with me.

Q In August of 1991, what part of the collective bargaining agreement between ICI and Local 912 applied to you as an employee of Rhone-Poulenc?

A They took out the part that applied to me without my consent.

Q And that's what you claim was a breach of duty that the union did?

A That's right.

Q And that's why you're claiming the Union should have filed a grievance on your behalf?

A That's right. If it was going to affect me, I should have been represented in the meeting.

...

Q What did the International do to breach its dusty to fairly represent you, if it had one?

A They had one.

Q How did the International have a duty to fairly represent you?

A Because they were supposed t uphold our contract just like the Local. We paid them dues every month, too, $6.00 a month.

Q So the basis of your claim against the International is that you paid them a per capita every month of $6.00?

A That's right. I was a member of it.

Q And they had a duty to uphold the contract?

A That's right.

Q Do you have evidence that --

A It's in that book right there, the constitution of the International Union.

Q And that is the sole basis upon which you make that statement. Is that correct?

A That's right.

Q And how did they breach that duty?

A They didn't give us any help when we asked for it, when we wrote them letters to ask for it. They've been involved. They knew about all this when it started, that it was going to happen one day. They knew our contract. It's their job to know our contract. And if they didn't know it, they're not doing their job.

...

Q Now, you did tell Mr. Branstetter, I believe, that you had some rights that vested in 1977?

A No, they vested when the plants split in 1982. Those were vested rights that wasn't supposed to be taken away.

Q How did those rights vest?

A They vested when the plants separated. The new employees didn't get those rights. The other employees retained those rights for one time in a lifetime. That's all you ever got to use them. They vested.

Q Is it your position that those rights could not be negotiated away?

A Not without having all the parties involved there, no, they couldn't.

Q Your position is that those rights cannot be negotiated away unless they have all the parties there?

A That's right.

...

Q Did the International have anything to do with your rights vesting in 1982?

A Yes. They was aware we had vested rights.

Q Excuse me, excuse me. Do you understand my question? I'm not asking you if they were aware. I'm asking you what role, if any, did they play in your so-called vesting of your rights in 1982?

A They had a man there when that was negotiated.

...

Q Thank you. So your position is by having a man there, the International, when those negotiations took place impressed upon the International an obligation?

A They were obligated when they accepted us as members.

...

Q I have some questions based on some things you were just talking about, Mr.

Farmer. As I understand it, you don't think the process by which this thing was taken out of the ICI contract was proper. Correct?

A Right.

Q Because you say that all parties have to be involved?

A That's right.

EXHIBIT
NO. 28
Karl Hall 5-27-92
Court Reporter

August 18, 1982

Mr. M. C. Hargett, Regional Director
International Union of Operating Engineers
5700 Brainard Road, Suite 214
Chattanooga, Tennessee 37411

Dear Sir and Brother:

Re: Strike Sanction at Stauffer Chemical Company, Mt. Pleasant Tennessee Plant

International Union of Operating Engineers, Local Union NO. 912's contract with Stauffer Chemical Company expires Saturday, September 11, 1982, at 3:00 P.M.

The parties meet Friday, August 20 to begin Negotiations. We then meet August 31, September 1, 2, 3, 7, 8, 10 and 11.

Local Union 912 has, currently, 347 members at the Company's Furnace and Organic plants. These two plants are under one contact. There are 221 members at the Furnace plant. The Organic plant has 126.

The Furnace plant's main product is elemental phosphorus, with slag and metal as a by-product.

The Organic plant's products are intermediates derived from phosphorus which are further refined to be used in the making of herbicides, insecticides, and pesticides.

Historically we have negotiated two-year contracts. In each negotiation the Company

has always had a proposal to separate and negotiate separate Agreements between the parties for the Furnace and Organic plants. This has always ben a strike issue with us for several reasons.

The first reason is that it would cut our bargaining power in half. The Company always, if a strike occurs attempts to operate with salary employees until a settlement is reached.

Secondly, the Union would have to have separate negotiations, separate meeting dates, etc., which would further increase our costs and tie up more of my Assistant's and my time. Time which we do not have to spare.

Last Friday, August 13, the Company's negotiator called me and told me to expect the Company's proposal to separate the plants; and

that this time the company meant to achieve the separation - even withstanding a long drawn out strike if necessary.

In my opinion, if the Company is not bluffing, the separation of the plants issue, will cause a strike.

Separation of the plants would affect the job security of all 347 employees. Now, hiring is done through the Furnace plant and the posting of jobs and reductions are done within both plants. If they were separate, one plant could be hiring, with the other plant laying off. You see what this would do to us.

This issue, along with the hardening of Stauffer's attitude, and the over-all economic situation could cause us some problems.

I thus request two things: One is some assistance from one of your staff, if you have one to spare; and secondly, strike sanction if it comes to that.

Thank you.

Fraternally,

/s James B. Kincade
James B. Kincade
Business Manager

JBK:fr

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL UNION NO. 912

(LOGO)

September 14, 1982

Mr. J.C. Turner, General President
International Union of Operating Engineers
1125 17th Street, N.W.
Washington, D.C. 20036

Mr. M.C. Hargett, Regional Director
IUOE, Region NO. 4
5700 Brainard Road
Suite 214
Chattanooga, Tennessee 37411

Dear Sirs and Brothers:

I am most grateful for your granting my request for "strike sanction" for the three contracts, Stauffer, Allied, and Stauffer Globe plant, that I had requested.

The Negotiating Committee, Brother Bennie Splain, and I were able to negotiate and reach a settlement with Stauffer at the Furnace and Organic Plants in Mt. Pleasant, Tennessee, on Saturday, September 11, after some of the hardest bargaining that I have encountered.

I am most appreciative for the help and expertise of Brother Splain. I, of course, knew that Brother Splain could be of immense help in reaching an agreement. He was!

Attached are copies of the Interim Agreements of the settlement. The settlement left a lot to be desired, but under all the circumstances: The Company's adamancy, the overall economy, etc., we were fortunate, in my opinion, to reach a settlement.

Again, thanks for your help and support.

Fraternally,

James B. Kincade
Busines Manager

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL UNION NO. 912

(LOGO)

November 5, 1985

Mr. M. C. Hargett, Regional Director
International Union of Operating Engineers
Suite 214 Brainard Building
5700 Brainard Road
Chattanooga, Tennessee 37411

Dear Brother Hargett:

Strike Benefits Stauffer Chemical Organic Plant, Mt. Pleasant, Tennessee, Local Union No. 912 - 136 members

A-352

I am requesting strike benefits for the week ending October 29 for 136 employees of Stauffer Chemical Company's Organic Plant. I am enclosing the signature sheets for the weeks of Oct. 2-9.

The Company, Union representatives, and Chuck Todd met on October 31. The membership then met on Friday and voted 71 to 36 to accept the Company's offer, and return to work November 4, 1985.

The final wages over three years - 0 - 2 3/4 - 2 3/4. There was some contract language change on overtime.

I appreciated the assistance of Brother Splain during the negotiating sessions.

Fraternally,

/s Wray H. Wright
Business Manager

WHW.:fr
Encls.

Field Representatives Activity Report

INTERNATIONAL UNION OF OPERATING ENGINEERS

1125 SEVENTEENTH ST., N.W.

WASHINGTON, D.C. 20036

REPORT OF Bennie L. Splain, Jr.

TITLE: International Representative

FOR THE TWO WEEK PERIOD August 15, 1982

TO August 28, 1982

Report on this form only a concise summary of your daily activities. Detailed reports should be filed by individual letter if a specific situation requires.

REGIONAL

DIRECTOR

OMISSIONS

DATE August 26,

I met in Columbia, Tennessee with James Kincade, Business Manager, Local 912, and George Limberg and Jon St. Clair of Stauffer Chemical Corporation, regarding the company's proposal to separate the Furnace Plant and the Organic Plant in agreement that is to be negotiated.

OMISSIONS

/s Bennie S. Splain, Jr.
SIGNATURE

Jackson, Mississippi 30209
CITY ZONE STATE

Field Representatives Activity Report

INTERNATIONAL UNION OF OPERATING ENGINEERS

1125 SEVENTEENTH ST., N.W.

WASHINGTON, D.C. 20036

REPORT OF Bennie L. Splain, Jr.

TITLE: International Representative

FOR THE TWO WEEK PERIOD August 29, 1982

TO September 11, 1982

Report on this form only a concise summary of your daily activities. Detailed reports should be filed by individual letter if a specific situation requires.

REGIONAL

DIRECTOR

OMISSIONS

DATE September 7

I was assigned to contract negotiations between Local 912 and Stauffer Chemical Company.

DATE September 8

I was assigned to contract negotiations between Local 912 and Stauffer Chemical Company.

DATE September 9

I was assigned to contract negotiations between Local 912 and Stauffer Chemical Company.

DATE September 10

I was assigned to contract negotiations between Local 912 and Stauffer Chemical Company.

DATE September 11

I was assigned to contract negotiations between Local 912 and Stauffer Chemical Company.

/s Bennie S. Splain, Jr.
SIGNATURE

Jackson, Mississippi 30209
CITY ZONE STATE

Field Representatives Activity Report

INTERNATIONAL UNION OF OPERATING ENGINEERS

1125 SEVENTEENTH ST., N.W.

WASHINGTON, D.C. 20036

REPORT OF Bennie L. Splain, Jr.

TITLE: International Representative

FOR THE TWO WEEK PERIOD October 20, 1985

TO November 2, 1985

Report on this form only a concise summary of your daily activities. Detailed reports should be filed by individual letter if a specific situation requires.

REGIONAL

DIRECTOR

A-359

OMISSIONS

DATE October 28

I drove to Columbia, Tennessee and met with Local 912's negotiating committee regarding contract negotiations with Stauffer Chemical Company - Organic Plant.

DATE October 29

I worked in Local 912's Columbia, Tennessee office preparing for negotiations with Stauffer Chemical Company and working on contract language and proposals for negotiations with Rhone-Poulenc, Inc.

DATE October 30

I met with John St. Clair of Stauffer Chemical Compan;y regarding Company movement and to explore possibilities of settlement.

DATE October 31

I was involved in contract negotiations between Local 912 and Stauffer Chemical Companay. We reached a tentative agreement subject to the approval of the membership.

DATE November 1

I attended a meeting of the Stauffer Chemical Company - Organic Plant employees to explain the tentative agreement.

Employees voted 71 to 36 to accept the Agreement.

OMISSIONS

/s Bennie S. Splain, Jr.
SIGNATURE

Jackson, Mississippi 30209
CITY ZONE STATE

Field Representatives Activity Report

INTERNATIONAL UNION OF OPERATING ENGINEERS

1125 SEVENTEENTH ST., N.W.

WASHINGTON, D.C. 20036

REPORT OF Garland Brewer

TITLE: International Representative

FOR THE TWO WEEK PERIOD 10-2, 1988

TO 10-15, 1988

Report on this form only a concise summary of your daily activities. Detailed reports should be filed by individual letter if a specific situation requires.

REGIONAL

DIRECTOR

OMISSIONS

DATE 10-4-88

Enroute to Columbia, Tn. where James Kincaid, Buis. Mgr. Local 912 and I attended negotiatioins with Stauffer Chemical Co. for a new agreement. I returned to Nashville, Tn. where I spent the night.

DATE 10-5-88

Same as 10-4-88.

DATE 10-6-88

Same as 10-4-88.

DATE 10-7-88

Same as 10-4-88.

OMISSIONS

DATE 10-11-88

Enroute to Columbia, TN. where Local 912 and I continued negotiations for a new agreement with the Stauffer Chemical Co. I returned to Nashville, TN. where I spent the night.

DATE 10-12-88

Same as 10-11-88.

DATE 10-13-88

Same as 10-11-88.

DATE 10-14-88

Same as 10-11-88. We reached an agreement. I reported to Regional Director B. L. Splain. Enroute to Camden, Tn.

OMISSIONS

/s Garland Brewer
SIGNATURE

Camden, Tennessee
CITY ZONE STATE

THE CONSTITUTION

THE INTERNATIONAL UNION

OF

OPERATING ENGINEERS

ARTICLE I

NAME, PURPOSES, GOVERNMENT

AND RITUAL

Name

Art. I. Section 1. This organization shall be known as the International Union of Operating Engineers and it shall be the policy of this organization to be affiliated with the AFL-CIO and such of its departments as this organization may deem expedient.

Purposes

Art. I. Section 2. The objects and purposes of this organization are to elevate the trade of operating engineers (by which trade the membership thereof earn a livelihood for themselves and their dependents) to its proper position in all industrial activity and the

ranks of organized workers; to encourage a higher standard of skill among its members; to cultivate feelings of friendship among the men of the craft and those who may employ its members; to organize all persons working in the jurisdiction of this International Union without regard to race, creed, color, sex, religion, age or national origin to promote the health, welfare and safety of its members and their families; to promote, foster and develop apprentice programs, training programs and other means to advance the skills, efficiency and working knowledge of its members; to assist its members in securing and stabilizing employment; to assist employers in obtaining skilled craftsmen; to secure improved wages, hours, and working conditions through assisting afiliated Local Unions in negotiating collective bargaing agreements and through legislative action and other appropriate means; to further, directly and

indirectly, the joint interest of thc members of the International Union in the betterment of general economic and social conditions in the world, by engaging in legislative, political, educational, civic welfare, and other appropriate activities; while preserving the integrity and autonomy of this International Union, to work within the AFL-CIO and to cooperate with other International Unions for the advancement of the entire labor movement, and to assist and cooperate with free and democratic labor organizations throughout the world; to provide aid and assistance for, and to bring about cooperation and coordination of effort among affiliated Local Unions; to insure the better protection of life and property by securing the enactment of state, provincial and city Engineers' License Laws and by other appropriate means; and to protect and strengthen our democratic institutions and to vigorously oppose the

efforts of those who advocate the overthrow of the established order, either of government or of this organization, by force or violence or subversive tactics.

Government

Art. 1. Section 3. The International Union of Operating Engineers shall be governed by the following bodies:

1. General Convention
2. General Executive Board
3. Officers
4. Board of Trustees
5. State and Provincial Organizations
6. Joint Executive Boards
7. District Councils
8. Parent Local Unions

and each of such bodies shall constitute a distinct entity each with its own separate identity but functioning in conformity to the Constitution and Ritual...

OMISSIONS

ARTICLE III

GENERAL CONVENTIONS

Powers

Art. III. Section 1. All the sovereign power, including the legislative, executive, administrative and judicial, of the International Union of Operating Engineers shall be vested in its General Convention when in session. Specifically, but not in limitation of the power thus vested, the General Convention may grant and issue charters for Local Unions and subdivisions thereof and local State and Provincial organizations and such other subdivisions of the International Union as from time to time may be deemed advisable; set the cost for said charters and necessary supplies issued with said charters; suspend and revoke any of said charters; adopt and issue a seal for the International Union, its General Officers, its Local Unions, local, State and Provincial

organizations and any other subdivisions; adopt, print and issue dues books and/or cards for the use of the membership; print and issue per capita tax dues stamps and collect for same; print, issue and mail an official journal; print and issue such books, stationery, supplies and paraphenalia and sell the same to affiliated Local Unions, local State and Provincial organizations and any other subdivisions for the proper keeping of their records and affairs; invest the funds of the International Union; buy and sell real estate (improved or otherwise) and bonds and other securities; establish, impose and collect per capita tax; establish, impose and collect assessments upon members, charter applicants, Local Unions, local, State and Provincial organizations and any other subdivisions as hereinafter provided; impose an initiation fee and an initiation fee tax; establish a Defense Fund and pay strike

benefits; establish, revise, amend and from time to time change the Death Benefit Fund and pay regulated benefits therefrom; supervise the operation of Local Unions, local, State and Provincial organizations and any other subdivisions and appoint supervisors and receivers when necessary; prefer charges against Local Unions, local, State and Provincial organizations and any other subdivisions and officers (individually or collectively) or their members (individually or collectively) and order trials with authority to discipline those affected; prefer charges and order trials with authority to discipline any General Officer or any member of the Board of Trustees; register, copyright and trademark the name of its official journal, its emblem and any document of the organization; establish and maintain a general headquarters in Washington, D.C.; employ clerical and other help; employ organizers and

deputies; confiscate and sue for the possession of all real and personal property, paraphernalia, books, charters, records, card indexes, seals and funds of a Local Union, local, State or Provincial organization and any other subdivision; establish a General Executive Board with full powers of the Convention between Conventions; include and adopt as part of the Constitution a procedure for the government and regulation of Local Unions, subdivisions thereof, local, State and Provincial organizations and any other subdivisions; establish, define, segregate, assign and amend craft jurisdiction and territorial jurisdiction to which Local Unions, their subdivision, local, State and Provincial organizations and any other subdivisions already established or hereinafter chartered shall confine their activities; establish, enter into, amend or abrogate understandings or written agreements

with other craft unions affiliated with the AFL-CIO; amalgamate competitive craft unions with the International Union of Operating Engineers and by such amalgamation compel all individual officers and member of the amalgamated union to be subservient to the Constitution, amendments thereto and decisions and orders of the General Executive Board and the General President of the International Union; review and decide appeal from decisions properly filed with it; provide for the general welfare of the organization and its members; take all steps necessary to protect the interests of the organization; make all disbursements necessary or appropriate in the exercise of the above powers or in the fulfillment of the objects and purposes of the International Union together with all other rights, powers, privileges and immunities not herein specifically denied.

OMISSIONS

ARTICLE VI

POWERS AND DUTIES OF THE GENERAL PRESIDENT

As Presiding Officer of Convention

Art. VI. Section 1. It shall be the duty of the General President to preside at all meetings of the General Convention. At least thirty (30) days prior to the holding of a General Convention he shall publish all decisions rendered by him during his term of office and shall mail copies of same to each Local Union in sufficient numbers to allow a copy for each delegate to the Convention.

To Review Cases and Interpret Laws, Etc.

Art. VI. Section 2. He shall review all cases, complaints and charges filed with the General Executive Board or the General Secretary-Treasurer. He shall be empowered to render decisions on the merits of such cases,

complaints and charges and his findings on the facts shall be final and conclusive. He shall also be empowered to interpret the provisions of the Constitution and decide questions of law arising thereunder. He shall be vested with all the administrative powers of the organization.

To Invoke and Administer International Supervision , and Other Peremptory Powers

Art. VI. Section 3. The General President shall have the power to require Local Unions, Local Officers and any other subdivision of the International Union and members to comply with this Constitution and any lawful rulings or orders of the International Union. For the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of the International Union, including the observance

of the Ritual, Obligation, law, rules or decisions of the organization or its duly constituted authorities, he shal have full power to suspend or remove such Local officers suspend or revoke charters of such Local Unions or place such Local Unions and their officers and members under International Supervision. He shall have power to designate and appoint persons to fill the places of those Local officers of Local Unions suspended, removed or placed under International Supervision, which appointees shall conduct the affairs over which they have been appointed for such time and in such manner as he may direct. All of the business, finances, affairs and government of any Local Union whose charter shall have been suspended by the General President or shall have been placed under International Supervision by him, shall be fully and completely conducted and administered by the General President or his

deputy "hereunto appointed with full power of control therein and thereover. During such suspension or International Supervision all rights and powers of the Local Union to conduct its own affairs shall be suspended. He or his deputy shall countersign all vouchers and checks for payment of monies or for withdrawing funds from the bank. He shall have power to appoint Local officers pro tem and all committees not otherwise provided for, to deputize any member in good standing to perform any of the powers and duties of his office.

Whenever the General President exercises his power under this Section to suspend or remove Local officers, suspend or revoke charters of Local Unions, or place such Local Unions and their officers and members under International Supervision, a hearing shall be held before him, or his authorized representative, to determine the necessity for

taking such action, with the General President making the ultimate decision. Reasonable notice of such hearing shall be afforded the officers and members of the subordinate union involved. If the General President determines that an emergency exists requiring immediate action to be taken prior to a hearing, he may take such action, but the hearing shall be held within a reasonable time thereafter. In all other cases the action will not be taken until a hearing has been held.

Failure of the General President to exercise the authority vested in him under this Section shall not in itself be considered as authorization for, or ratification or condonation of, any act or any failure to act on the part of any Local Union or other subdivision of the international Union, or their officers, employees, members or agents.

To Issue Charters, Etc.

Art. VI. Section 4. He shall be vested with full discretionary power to issue charters. He shall have power to appoint Representatives of the International Union in such localities as shall appear to him to be for the best interest of the organization.

As Chairman of General Executive Board, Etc.

Art. VI. Section 5. He shall preside as chairman of the General Executive Board and shall make a full report of the work in his office at each Board meeting. He shall devote his full time to the duties of his office. He shall have power to call upon any and all subdivisions, officers and member for assistance and advise when occasion demands or requires it. He shall be strictly accountable and responsible for the faithful performance of his duties and shall administer and enforce every law, rule, regulation and requirement of the Constitution, Ritual and Obligation. He

shall be vested with unlimited discretion in the application and administration of his powers and duties. He shall be vested with such other powers and duties as the General Executive Board may from time to time specifically delegate to him.

OMISSIONS

To Make Visitations

Art. VI. Section 8. Should any Local Union be involved in trouble or submit grievances to the General President or the General Executive Board, the General President shall visit such Local Union in person or send a deputy.

Vested With All Powers of General Executive Board in Interim, Etc.

Art. VI. Section 9. All powers heretofore vested in the General Executive Board when in session shall, when the same is not in session, pass to and vest in the General President. All of the acts and decisions of

the General President shall be reviewable by the General Executive Board and shall continue in full force and effect until revoked by action of the General Executive Board.

OMISSIONS

ARTICLE X

MEMBERSHIP

Qualifications

Art. X. Section 1. Any engineer engaged in the craft over which this organization exercises craft jurisdiction, or other person who may qualify to become a junior engineer, assistant engineer, or registered apprentice engineer therein, and any other engineer engaged as an inspector of boilers or other machinery or as an examiner of engineers, or any other person, may upon application, acceptance and initiation in the manner and form required in this Constitution, become a member of the International Union of Operating

Engineers. No person who is otherwise eligible under The qualifications fixed herein, but who is opposed to organized labor, shall be admitted to membership No person shall be denied membership on the basis of race, creed, color, sex, religion, age or national origin.

No applicant for membership shall apply to or be accepted by any Local Union other than the one within the jurisdiction in which he is emoloyed unless such Local Union shall consent to his afiliation therewith.

Minimum and Maximum Initiation Fees and Dues

Art. X. Section 2. The minimum initiation fee in all Local Unions shall be not less than Five Dollars ($5.00) per applicant. *The minimum monthly dues in all Local Unions that do not charge administrative, supplemental or working dues, shall not be less than Eleven Dollars ($11. 00) per month per active member; Eleven Dollars and Fifty Cents ($11.50) per active member as of July 1, 1988; Twelve*

Dollars ($12.00) per active member on and after July 1 1989; Twelve Dollars and Fifty Cents ($12.50) per active member on and after July 1, 1990 Thirteen Dollars ($13.00) per active member on and after duly 1, 1991; and thereafter, when the per capita tax payable to the International Union is increased pursuant to the provisions of Article XI, Section 1, the minimum dues shall be increased in a corresponding amount. Maximum initiation fees and maximum dues charged by Local Unions to their applicants or members may, from time to time, be fixed by the General President.

No proposed increase in initiation fees may be voted upon by a Local Union unless and until the proposed increase is approved by the General President.

ARTICLE XI

INCOME OF INTERNATIONAL UNION

Per Capita Tax

Art. XI. Section 1. Each Local Union must pay the General Secretary-Treasurer a per capita tax of *$4.50* per month for each member oF the Local Union and its Subdivisions *($5.00 for each member on and after July 1, 1988; $5.50 for each member on and after July 1, 1989; $6.00 on and after July 1, 1990; $6.50 on and after July 1, 1991)* who has not been reported to the General Secretary-Treasurer as suspended, withdrawn, transferred or expelled, and in addition an amount equal to the per capita tax must be paid for each person making payments to the Local Union in lieu of dues under agency shop or similar provisions. The per capita tax report signed by the Financial Secretary must be transmitted to the General Secretary-Treasurer on or before the fifteenth day of the month following that for which the per capita tax is due.

A payment computed on the closing membership for the month *($4.50 for each*

member; $5.00 on and after July 1, 1988; $5.50 on and after July 1, 1989; $6.00 on and after July 1, 1990; $6.50 on and after July 1, 1991) and the initiation fee tax (25% of the current initiation fee) on each member initiated for the month, must be submitted with the per capita tax report. Thereafter, the General Secretary-Treasurer shall transmit to the Financial Secretary a receipt for the initial amount remitted with a statement covering the remaining amounts due for the month for which the per capita tax was filed for assessments and back per capita tax on suspended members reinstated, expelled members reinstated, members admitted on withdrawal cards, per capita tax for members deducted deceased and members deducted on withdrawal cards and differences of initiation fee tax. The per capita tax due shall immediately be remitted to the General Secretary-Treasurer by the Financial Secretary. The General Secretary-

Treasurer shall return a receipt covering payment of balances due.

However, if in the judgment of the General Executive Board, a different form of billing procedure may be desired, such change may be made by the Board.

Notwithstanding the above, the General Executive Board shall have the authority, *to set aside the per capita tax increases otherwise effective July 1, 1990 and July 1, 1991, if it determines such action to be in the best interest of the organization.*

*****OMISSIONS*****

Initiation Fee Taxes and

International Initiation Fees

Art. XI. Section 4. The Financial Secretaries of Local Unions shall forward to the General Secretary-Treasurer with the report required by this Article for the month in which new members have been initiated into

membership in the Local Union or any subdivision thereof the following for each newly initiated member:

Initiation Fee Tax–*Twenty-five* (25) percent upon the initiation fee established as of the date of reporting the new member. The initiation fee shall be deemed to include all fees, assessments and other charges required to be paid upon admission to membership, howsoever identified, but shall not be deemed to include any assessment for the maintenance of a Local Union death benefit fund.

Reinstatement Assessments

Art. XI. Section 5. The Financial Secretaries of Local Unions shall forward to the General Secretary-Treasurer with the report required for the month in which members are reinstated the following:

(a) Five ($5.00) Dollars for each member reinstated to membership who

has held a withdrawal card as provided in Article XV.

(b) Five ($5.00) Dollars for each member reinstated to membership after suspension or expulsion plus per capita tax for each month required, and such other charges as may be provided for in Article XXIV.

Other Fees, Taxes and Assessments

Art. XI. Section 6. Subject to applicable laws, other fees, taxes, assessments and other charges for obtaining income for the International Union for any purpose may be increased, decreased, changed or added from time to time by the General Convention or the General Executive Board.

*****OMISSIONS*****

ARTICLE XIV

CHARTERS

Classification of Charters

Art. XIV. Section 1. Charters of the International Union of Operating Engineers may be granted to Local Unions, District Councils, Local Joint Executive Boards, Local State and Provincial Organizations, to Local Unions [or Junior and Assistant Engineers' Subdivisions, Registered Apprentice Engineers' Subdivisions, and Branch Engineers' Subdivisions, and to such other subdivisions as may from time to time be authorized and established.

Application for Charters

Art. XIV. Section 2. An application for a charter of a Local Union shall be upon the form prescribed by the International Union of Operating Engineers and shall be *signed by* not less than fifteen (15) applicants none of whom shall be members of the International Union, which requirements may be changed by the International Union. The requirements for all, other applications for charters shall be established by the General Executive Board.

Qualification of Applicants

Art. XIV. Section 3. Upon receipt of an application for a charter, the General President shall proceed to satisfy himself that the applicants are qualified, and if found to be so he shall direct the General Secretary-Treasurer to issue the charter. In the formation of new Local Unions the members thereof shall be charged such charter fees, entrance fees and organization fees as the International Union shall establish.

*****OMISSIONS*****

Property of Local Unions

Art. XIV. Section 8(a). The supplies furnished with a charter for a Local Union will be a voucher and receipt book, one seal, Financial Secretary's book, Treasurer's book, one minutes book, one day book three rituals, one hundred letterheads, one hundred envelopes (stock), fifty application cards and fifteen

copies of the Constitution. Membership books and/or cards, the charter, seal and all books and other paraphernalia shall be the property of the International Union and shall be delivered to the General President of the International Union upon demand by the General Executive Board, or by order of the General Convention.

Art. XIV. Section 8(b). If at any time a Local Union or other subdivision shall withdraw, lapse, dissolve, be suspended, placed under supervision or expelled from the International Union, or shall have its charter revoked, all of its real and personal property, paraphernalia, books, charter, seal, records, card indexes and funds shall immediately revert to the International Union and the General President shall at once, in person or by deputy, take possession of such property, paraphernalia, books, charter, seal, records, card indexes and funds of said Local

Union or other subdivision, all of which he or his deputy shall receipt for, and he or his deputy shall forward the same to the General Office or hold as directed.

Art XIV. Section 8(c). The officers and members of said Local Union or other subdivision, individually and collectively, shall be held strictly responsible for all such property, paraphernalia, books, charter, seal, records, card indexes and funds until they are turned over to the General President or his authorized representative and receipted for.

Art. XIV. Section 8(d). They shall be individually and collectively accountable therefor to the International Union, and suit may be instituted through the General President to recover the real and personal property, paraphernalia, books, charter, seal, records, card indexes and funds, or for money damages

if any of them have been concealed or destroyed.

Art. XIV. Section 8(e). All supplies necessary for the proper functioning of Local Unions shall be uniform, and all Local Unions must secure such supplies from the General Secretary-Treasurer, application to be made therefor, on the official order blank, accompanied by the necessary monies to cover the cost of the same, and no Local Union, under penalty of expulsion, shall furnish any other Local Union with any of such supplies, nor use any such supplies unless furnished by the International Union.

Form of Charter

Art. XIV. Section 9. No charter to a Local Union shall hereafter be granted unless the same shall distinctly state upon its face a description of the territorial and craft jurisdiction conferred, qualified by a statement that such territorial and craft

jurisdiction so conferred may be amended, restricted or enlarged by the International Union. Charters issued in accordance with this Article shall be in such form as the General Executive Board shall prescribe, consistent with the Constitution and laws of the International Union of Operating Engineers.

OMISSIONS

ARTICLE XVI

DISCIPLINE AND EXPULSION

IN GENERAL

Penalty for Issuing Defamatory Literature

Art. XVI. Section 1. In addition to the provisions of this Constitution setting forth the causes and the manner and form in which Local Unions, officers and members thereof may be disciplined and penalties may be invoked, any Local Union, subdivision or member thereof publishing or circulating literature of a defamatory nature in violation of their

responsibility toward the International Union or any of its subordinate bodies as an institution, or engaging in conduct that would interfere with the performance by the International Union or any of its subordinate bodies of their legal or contractual obligations, may be tried by the General Executive Board upon charges filed with it, and upon conviction, may be disciplined or expelled as the General Executive Board may determine.

OMISSIONS

General Executive Board May Prosecute

Art. XVI. Section 3. Any violation of the Constitution, Laws, Obligation and Ritual, or the rules, regulations and edicts issued by any officer or subdivision thereunto authorized by any member, subdivision or officer, may, if not prosecuted by the subdivision thereunto authorized, or if no

provision has been made therefor, be prosecuted, heard and penalized by the General Executive Board.

OMISSIONS

ART. XXIV-SUBDIVISION 3

DUTIES OF MEMBERS

Art. XXIV. Subdiv 3. Section (a). Members of Local Unions shall conform to and abide by the Constitution, Laws, Rules, Obligation and Ritual, and the decisions, rulings, orders and directions of any authority of the International Union empowered by this Constitution to make them. Each member shall keep the Recording-Corresponding Secretary properly and promptly notified of his residence and any change thereof. Consistent with applicable law, each member shall do all in his power to advance the cause of orqanized labor through the encouragement of the use of union goods and services. Members may, upon

proper credentials being produced, obtain admission to meetings of other Local Unions of the organization.

Art. XXIV. Subdiv. 3. Section (b). The admission to membership, in conformity to the Constitution, Obligation and Ritual constitutes a contract between the member, his Local Union, the International Union and every other member therein, whereby, in consideration of the benefits bestowed by such membership, he agrees that he will remain a member until expelled; that he will not violate the Constitution, Laws, Rules, Obligation and Ritual, and the decisions, rulings, orders and directions of the International Union or its subordinate branches, nor the trade rules of the locality in which he works; that he will not enter into the employment of any person conditioned on severing his membership with this organization; that upon the termination of his

membership he will acknowledge his Obligation to be still binding upon him and refrain from doing any act or deed in violation of the principles, Constitution, Laws, Obligation, Ritual and policies of this Organization, and the decisions, rulings, orders and directions of any authority of the International Union empowered by this Constitution to make them.

OMISSIONS

ART. XXIV-SUBDIVISION II

RELATIONS WITH EMPLOYERS

Grievances and Procedures

Art. XXIV. Subdiv. 11. Section (a). No action shall be taken by any Local Union, Local Executive Board, Officer, Committee or Business Representative of a Local Union affecting the relations between an employer and the Local Union or its members unless authorized as hereinafter provided.

Art. XXIV. Subdiv. 11. Section (b). When a difficulty or a dispute arises between an employer and a member or members in good standing in a Local Union such member or members shall first report the same to the Business Representative or the Local Executive Board or the Local Union. The Business Representative, Local Executive Board or the Local Union shall immediately investigate the facts and confer with the employer with a view of adjusting said difficulty or dispute. If no settlement of the dispute has been effected, then the authority investigating the facts connected with said dispute may, if vested with the power to do so, immediately order and direct any necessary action deemed as required under the circumstances, through the removal of the member or members affected, through strike or by stoppage of all work, or by securing a strike of all such other trades and workmen as can be obtained. Where Local Unions

are affiliated with Councils of Labor and like bodies in their respective communities such Local Unions may take such action upon grievances or disputes between employers and employees as shall be recommended or authorized by the Labor Councils and other bodies with which they may be associated regardless of whether such grievances or disputes arise between members of a Local Union in this organization or members of any other union, with employers.

Art. XXIV. Subdiv. 11. Section (c). No Local Union through its Committee, Local Executive Board or Business Representative shall attempt to take or take any action involving a rupture of relations existing under a legal contract with any employer or declare a strike where such contract exists except upon the following reasons, viz:

1. Assisting trade unions or other union workmen.

2. Assisting Councils of Labor or other bodies with which the Local Union is affiliated.

3. Violation by the employer of the written contract.

4. To protect the craft jurisdiction or the territorial jurisdiction of the Local Union.

Nor shall any such action be attempted or taken unless the same has been sanctioned by the General President of the International Union.

Sanction of the General President

Art. XXIV. Subdiv. 11. Section (d). If the dispute shall not be settled and the Local Union shall desire assistance or strike benefits from the International Union, the General President shall be informed of all the facts thereof; and, if in his opinion the grievance is a just one, he may give his sanction and give the support of the

International Union to the action contemplated or already entered into by the Local Union, its Committee, Local Executive Board or Business Representative. If, under any circumstances, the General President shall be represented by a deputy in the investigation of a dispute or a contemplated action or an action that has already been entered into on the part of a Local Union, its Local Executive Board, its Committees or its Business Representative, the deputy shall report in detail to the General President and the General President can through a deputy convey such sanction and support required as though present in person.

Contracts

Art. XXIV. Subdiv. 11. Section (e). Proposed collective bargaining agreements and modifications thereof may be negotiated for Local Unions by the Business Manager, by a committee, by the Local Executive Board, or by

the Business Representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected, provided, however, that a Local Union may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership.

When such approval has been obtained, the agreement shall be signed bv the Local Union's President, Recording-Corresponding Secretary, and Business Manager where the Local Union has such a position. Copies of final agreements and modifications thereof negotiated by Local Unions shall be filed with the General President immediately after execution.

OMISSIONS

MR. STEINER: May it please Your Honor? I have a stipulation that I would -

THE COURT: Ladies and gentlemen, you will recall my instructions at the beginning of the case that the evidence in this case would consist of the testimony of witnesses and documents and possibly other things received into the record as well as any stipulations or agreements that the parties enter into.

And you're about to hear a stipulation, that's an agreement as to certain facts. This is evidence, you can take these facts as proven, and it's evidence and it's evidence for your consideration.

All right, Mr. Steiner, if you will read the stipulation, please.

MR. STEINER: My it please Your Honor and members of the jury? These stipulations have been numbered.

One, Stauffer Chemical Company, division of Rhone-Poulenc, Inc., successor to Stauffer Chemical Company, under the 1985 Collective Bargaining Agreement for the furnace plant and operated under the 1988 Collective Bargaining Agreement, from December 2nd, 1987, until October 13, 1988.

Then we skip over a number.

Number three, no plaintiff has previously transferred between the plants or refused to transfer after layoff under the memorandum agreement of September 13, 1982.

Rhone-Poulenc laid off the following plaintiffs in July of 1991:

Rickey Patrick, Michael Lindsey, Ricky Farmer.

Rhone-Poulenc laid off the following plaintiffs after July of 1991:

Gene Barker, Ray Bassham, Russell Bishop, Thomas Bishop, Tony Brock, Dennis Butler, Waylon Carroll, Hazel Chapman, William

Claude, W. T. Colvert, Mike Fazekas, Robert Gilliam, Danny Green, Michael Harlow, Jerry Hicks, Walter Hudspeth, Mark Hunt, Gerald Isabell, Nadine James, Richard W. James, William Jarratt, Terry Jennings, Bobby Kelly, Milton Knowles, Rickey Lindsey, Jimmy Lott, Roland McKnight, Raymond Neely, Terrance Nevette, David Osborn, David Paley, Michael Pilkinton, James Riddle, Charles Robinson, Andrew L. Scott, James R. Scott, Jr., Joseph Shyes, Sharon Liles Steiner, Terry Thomason, Robert Tidwell, Joy Ward, Michael Whitwell, Geneva Higgins.

And the following plaintiffs are still employed by Rhone-Poulenc:

Sammy Boshers, Charles Polk. Marvin Henson. Joe Blair, James Frierson, Wayne Frierson, Edward Rogers, Guerry Cole, Charles Frierson, Bob Gray, Lois Brown, Albert Akins, Gary Riley, Charles Wright, Lonnie Bradburn, Douglas Lindsey, Alfonzia Akins, David

Workman, Gregory Claude, George Parsons, Willie Roy Thompson.

The plaintiff Leland Webster recently retired from Rhone-Poulenc.

That's the end of the stipulation, Your Honor.

THE COURT: All right.

MR. STEINER: Submit this.

THE COURT: That was one, three and four?

MR. STEINER: One, three, four, five, six and seven, Your Honor.

THE COURT: All right.

MR. OZIER: Mr. Steiner, do you have copies of that for us?

MR. STEINER: I had furnished you all copies previously.

THE COURT: Are these the stipulations that were filed?

MR. STEINER: It's signed by everyone.

THE COURT: Were these the ones that were filed?

MR. STEINER: No, Your Honor. No. These are the ones at the beginning of the trial. I gave -- but I think I have another copy, but I gave each one a copy when I submitted the original to you.

MR. OZIER: We would like a signed copy.

THE COURT: Miss Suzanne, make copies of these so that everybody will have a copy in hand.

MR. STEINER: Call David Paley, Your Honor.

and you sat there and didn't say a word, and by all rights I ought to make you just stay here. And you~re not going to be excused in the future.

MR. STEGALL: I hope I won't.

THE COURT: Keep your ears open and pay attention. But you're going to do your duty. You're excused and discharged, you can go.

MR. STEGALL: Thank you.

THE COURT: All right. Now on the question of Stauffer Chemical Company, as I understand it, as I posed the question in chambers, there is no dispute but that the detailing of the various corporate transactions set forth in the opinion of the Superior Court of Delaware is accurate?

MR. STEINER: Yes, Your Honor, as supplemented.

MR. OZIER: Your Honor, we think those facts are accurate.

THE COURT: As I understand it, there is no question but that Rhone-Poulenc and Rhone-Poulenc Basic Chemicals, the corporate defendants in this case, agree and expressly state and so represent to the court, on the record, that these defendants assumed the 1985 Collective Bargaining Agreement that had incorporated in it as a part of the Collective Bargaining Agreement the side agreement that is sometimes referred to as the October 13, 1982, agreement.

Is that correct, Mr. Ozier?

MR. OZIER: Yes, sir. September 13.

THE COURT: September 13?

MR. OZIER: That's correct, Your Honor.

THE COURT: And that if liability arises out of it, although it was first negotiated when Stauffer was in the saddle, it would be the liability of these corporate

defendants present before the court, is that correct?

MR. OZIER: That's correct, Your Honor. Any liability under the 1985 or the 1988 Collective Bargaining Agreement is our liability, Rhone-Poulenc, Inc. and Rhone-Poulenc Basic Chemicals Co.

MR. STEINER: Or 1991.

MR. OZIER: Or 1991.

THE COURT: All right. And based upon that representation, you agree that we can sweep Stauffer out of the way?

MR. STEINER: Yes, Your Honor.

THE COURT All right. The action will stand dismissed as to Stauffer. I think it's abundantly clear Stauffer simply doesn't exist. Stauffer is given the -despite all the bumbling in the corporate papers -- the various corporate transactions come out, the bottom line, that its existence is ended as a result of these various mergers. But after the

representation on the record, it's agreed that Stauffer be dismissed as a party defendant.

...

THE COURT: Well, I think we can put aside, I'll ask this in a way to see if we can crystallize these issues. You don't insist that this is an instance where there was a sufficient allegation that the president was in some fashion obligated to exercise his powers to place the local in trusteeship, do you?

MR. STEINER: No, Your Honor.

THE COURT: That's to address financial irregularities and gross misconduct and only in an emergency can he do it without a hearing. Now if we can disregard that portion --

MR. STEINER: Yes, Your Honor.

THE COURT: Okay.

MR. BARRETT: Thank you, Your Honor. Appreciate counsel's candor.

THE COURT: That arose in part of Mr. Hanley's affidavit that he goes into those

Canadian cases and also the case of a start-up local where he keeps it under international supervision to get a fledgling local started, and also those three or four New Brunswick, Quebec, and those Canadian cases where the finances were in disarray, the business manager of one local had been convicted of embezzlement, all that is not applicable to this situation.

...

MR. STEINER: Oh, yes. Mr. Nevette's letter came in, he knew about Mr. Nevette's letter and exactly what he was saying.

But then he got Mr. Kincade's letter, and not only like the additional letter where he knew that the local union was telling these people, Your rights will not be affected, don't worry about it, don't do anything. He knew that from the letters. And he did nothing.

And then when he got the second letter, he knew from Mr. Kincade that the grievance was not going to be pursued and he knew that it wasn't going to be pursued because it would affect the ICI group of employees. And he knew fully of the conflict of interest involved and he favored the surviving company.

And I believe that such arbitrariness on a union constitution, where they say the president is strictly accountable -- they don't say strictly accountable. Let me just read the exact words, Your Honor.

He shall --

THE COURT: What page?

MR. STEINER: This is page 24. Top of the page, second line down.

THE COURT: Yes.

MR. STEINER: H shall be strictly accountable and responsible for the faithful performance of his duties and shall -- doesn't

use any other term -- shall administer and enforce every law, rule, regulation and requirement of the constitution, Ritual and Obligation.

Those are clear words, they told these plaintiffs.

...

MR. STEINER: But they gave him authority for unlimited discretion, but ahead of that they said he shall be strictly --

THE COURT: No.

MR. STEINER: Strictly accountable

THE COURT: Peculiarly enough they make him accountable first and then diminish it.

MR. STEINER: Well, Your Honor, these terms are supposed to be construed consistently.

THE COURT: I agreed.

...

MR. STEINER: The admission to membership in conformity to the Constitution, Obligation and Ritual constitutes a contract between the member, his local union, the international union and every other member therein.

THE COURT: I don't believe you're getting a single dissent over there. You wouldn't even be here. You would have gone on motion for summary judgment if you didn't have a colorable contract claim. I mean the only basis you have survived, your clients have survived the motion is because they stand in a contractual relationship.

MR. STEINER: Well, if it is a contract, there must be provisions that it can be enforceable and not just subject to some arbitrary unlimited discretion. When they said unlimited discretion, you have to look at the other terms of the contract that mean things.

THE COURT: Now you want me to strike the constitution down?

MR. STEINER: No. If it is a contract, there are contractual provisions in it.

...

MR. STEINER: It's a more tortuous matter than it is a contract matter when you get into these type situations when you're talking about a contract, when people pay dues every month and say we want certain --

THE COURT: Well, they pay dues over here too.

MR. STEINER: Pardon me?

THE COURT: I say they paid dues in Brenner too.

MR. STEINER: I'm telling you, not on the protection, when you pay dues for someone to keep your books for you, or do a normal contract matter, you have duties that you expect under normal contract matters. You

don't pay dues generally to be protected from tortuous assaults. But for the actual functioning of the international union, carrying on the union business, this is essential, this was an absolute part of making the union function the way that it should. Performing the very duties that the constitution spelled out. These were contractual matters and the international president, the international union says, You join our union and these are the services we will give you, and they did not give them those services.

THE COURT: All right. I think I have got it. Something else you want to say?

MR. STEINER: No. Your Honor.

...

MR. STEINER: May it please Your Honor? The reason that was offered was strictly for the provision assuring the performance of the collective bargaining

agreements or other duties of a bargaining representative. I was going to have him -- or he was going to testify that no, this was not a case of international supervision, but that the general president was vested with the power -- this is where the power is stated -- and it's a range of power. It says he shall have the power to suspend or remove such local officers. That's one thing. The full power, this is defining his extent of power. Or he shall have the power to suspend or revoke charters of such local unions. That's another part. And then the final is or place such local unions and their officers and members under international supervision. That's the extreme limit.

But this shows that he had the full power to correct this with the local officials and is --

THE COURT: But how do you correct it? You can't read it in isolation, one

sentence. How does he exercise his power? He exercises it by this extraordinary powder to intervene in the affairs of the local.

MR. STEINER: I don't think that is what it says. Your Honor. He has the full power to go as far as suspending a union official or removing. He has the full power to do that. He has power all the way up to that. That indicates he has power to do anything. You can call him on the phone, he has supervisory power over them. But the international -- the placing them under international supervision is the third thing. That's the extreme of his limit. It says or as a final power place such local unions under international supervision. That's the extent of his power.

The other two provisions are saying he has the power to do two things; has full power to suspend or remove the officials or suspend or revoke charters or place them under

supervision. That's a range of powers. And that's the reason this was being put in, just to show the range of his power. And the first thing he was going to say is that, no, this is not an international supervision situation. That's the limit of his powers. All we're stating is this is the type powers the president has. It can go all the way up to that.

But in this case all we're talking about is all he had to do was call and use a telephone. But this shows that the president had power to take corrective action in regard to that agreement assuring the performance of collective bargaining agreements or other duties of a bargaining representative.

And I believe that -- certainly think that the jury should, since it is a full sentence like Your Honor said, that the full sentence of his power, the thing should be

read and then state this is the provisions applicable to this case.

THE COURT: What provision?

MR. STEINER: The provisions that for the purpose of assuring the performance of collective bargaining agreements or other duties of a bargaining representative he shall have full power to suspend or remove such local officers, suspend or revoke charters. That power --

THE COURT: But that power is not at issue in this case because you conceded it. That this isn't a case to suspend or remove officers or to suspend or revoke charters.

MR. STEINER: No, Your Honor, but that shows the extent of his power. That shows he has power all the way up to do this. He has full power to do that. That includes power of supervision.

This is the key clause that we rely on, this is assuring the performance, and this

is what are the duties of a bargaining representative. This is the very clause that Your Honor said in the memorandum opinion was violated.

THE COURT: But you on your feet last night conceded that under the facts of the case now that we're in trial and explored it that is not to be invoked.

MR. STEINER: Oh, I didn't understand it that way, Your Honor. I understood that we're not asking international supervision. This is not an international supervision case. ...

...

... And it's unnecessary in view of the fact that there was a clear statement on the record last night during the legal arguments on those motions that this simply wasn't a case where -- because I put that to you, I said, Mr. Steiner, are you making any insistence that this is a case where the intervention of the

general president under his powers to place this union in a trusteeship is involved? And you said, No, Judge, it isn't.

And then Mr. Barrett was getting ready to launch into that as part of his argument, and he turned to you, or he said to the court that he very much appreciated the concession or the lawyerlike concession on the part of Mr. Steiner. Those were almost his verbatim words.

I said, Mr. Barrett, you don't even need to go into that part because it's not an issue in this case. Mr. Steiner has removed it.

...

MR. STEINER: He has full power to suspend or remove local officers, suspend or revoke charters of such local unions, or place such local unions and their officers and members under international supervision -- which is a lawyer word or another way of

saying trusteeship. That's the extreme power he had.

And the other is the full power to do this, if he has full power to do this, he has full power to control this situation here when he would call them on the phone, which is probably the only remedy required here, that he had to do and say, Do this, or, Render this opinion. That shows the range of his power, and that was the only purpose that it was offered and it clearly indicates a range by using the word or, this final thing they list here --

THE COURT: Well, the sanctions are all raised in the disjunctive. It starts out after he shall have full powers to suspend or -- the first disjunctive -- remove, and then comma, suspend, that's officers disjunctive or revoke charters.

MR. STEINER: That is suspend or revoke applies to charters and the other suspend or remove applies to local officers.

THE COURT: That's right.

MR. STEINER: Then there is a final one that says which is the extreme power, or place them under international supervision.

THE COURT: And you don't suggest that this is a case to suspend or remove local officers.

MR. STEINER: No, I said it just has the full power to do that. That shows the power of the president to remedy this particular defect. If he has that power, that, the full power, that covers power all the way down for him being able to call them on the phone. That's the type power he has.

But the extreme power is placing it under a trusteeship, and there is no indication of that, that that's the requirement or what would be even asked here.

In fact, specifically the witness was going to say, that's not what should have been done here, or we're asking to be done here.

All we are asking was that the president act with these full powers that he had. Not that extreme power, which is the final extreme thing set as the third power to place under international trusteeship, and no intention of that ever be done.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALBERT AKINS, et al.,	)	
	)	
Plaintiffs - Appellants,	)	
	)	
TONY BROCK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	NO. 94-5132
	)	
ZENECA, INC.,; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912 INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,	)	
	)	
Defendants - Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE -
COLUMBIA DIVISION

BRIEF FOR APPELLANTS

FRANK STEINER
Steiner & Steiner
214 Second Avenue North
Suite 203
Nashville, TN 37201-1644
(615) 244-5063

Attorney for Appellants

OMISSIONS

ISSUES PRESENTED FOR REVIEW

1. Whether Plaintiffs' rights to transfer to the organic plant under the Cross-Bumping Agreement of 9/13/82 were vested and binding on the Defendant, ICI.[1]

2. Whether the Trial Court erred as a matter of law in entering summary judgment for the Defendant, ICI.

3. Whether the Defendant, Rhone-Poulenc carried its burden of proof to show that the impossibility doctrine was applicable and that performance of its contractual obligations under the Cross-Bumping Agreement was in fact impossible.

4. Whether the Memorandum Agreement of October 13, 1988, changed the

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[1] For clarity, Zeneca, Inc. (formerly ICI Americas, Inc.) is referred to as ICI; Rhone-Poulenc, Inc. and Rhone-Poulenc Basic Chemicals Co. as Rhone-Poulenc; International Union of Operating Engineers, AFL-CIO as International Union; and Local 912 International Union of Operating Engineers, AFL-CIO as Local 912.

obligations of Rhone-Poulenc to Plaintiffs under the Cross-Bumping Agreement?

5. Whether the Memorandum Agreement of October 13, 1988, was ambiguous, creating an issue for the jury?

6. Whether it was error to enter judgment for Rhone-Poulenc under Rule 50 of the Federal Rules of Civil Procedure as a matter of law.

7. Whether waivers, as provided for in the Memorandum Agreement of April 19, 1991, signed by certain Plaintiffs in exchange for severance pay, also released the claims against Rhone-Poulenc involved in this matter.

8. Whether the Memorandum Agreement of April 19, 1991, providing for severance pay, was ambiguous, creating a jury issue as to the effect of a waiver of certain claims against Rhone-Poulenc.

9. Whether Local 912 had a conflict of interest between bargaining units

and favored the other unit over Plaintiffs' unit.

10. Whether Local 912 breached contractual obligations to Plaintiffs under the Union Constitution by not permitting Plaintiffs to participate in the negotiations of the 1991 ICI contract nor submitting that contract to Plaintiffs for approval.

11. Whether Local 912 breached its duty of fair representation to Plaintiffs.

12. Whether the International Union was a participant and fully bound and responsible for the actions of Local 912.

13. Whether the International Union had a conflict of interest between bargaining units and favored the other unit over Plaintiffs.

14. Whether the International Union had a duty of fair representation to Plaintiffs.

15. Whether the International Union breached contractual obligations to Plaintiffs under the Union Constitution by permitting Local 912 to enter the 1991 ICI contract without Plaintiffs' participation, and by permitting Local 912 to refuse to pursue grievances for Plaintiffs and by failing to act as requested.

16. Whether Defendants conspired against the Plaintiffs, including induced breaches of trust and contract.

STATEMENT OF THE CASE

Plaintiffs sued Defendants alleging that under a written Memorandum Agreement of September 13, 1982, known as the "Cross-Bumping Agreement", they were entitled to transfer to the organic plant if they were laid off from the furnace plant. Plaintiffs further alleged that Defendants engaged in a conspiracy against Plaintiffs and that when they were laid off in 1991, Defendants refused

to furnish them the transfer rights granted them under the Cross-Bumping Agreement. (R. 1.)

Defendants filed motions to dismiss and for summary judgment. On August 27, 1993, the Court granted summary judgment, completely dismissing the claims against ICI; dismissing the claims against Rhone-Poulenc of the Plaintiffs who had signed waivers in exchange for severance pay; dismissing the conspiracy claims, including breaches of trust and contract; and further holding that the International Union had no duty of fair representation to Plaintiffs and the International Union was not responsible for the actions of Local 912. The Court held the Cross-Bumping Agreement clearly provided transfer rights to Plaintiffs, that the Memorandum Agreement of 10/13/88 was ambiguous and denied summary judgment for the Rhone-Poulenc Defendants. The Court further denied

summary judgment to Local 912 on the claims involving duty of fair representation and breaches of the Union Constitution. The Court also denied summary judgment to the International Union on the claims involving breaches of the Union Constitution. (R. 171, memorandum of the Court.)

Thereafter, a trial was held from October 18, 1993, to October 21, 1993. On October 19, 1993, the Court dismissed Stauffer Chemical Company as a Defendant based on the representations of Rhone-Poulenc that it was responsible for any liability of Stauffer Chemical Company. (TR. 248, 249.) On October 21, 1993, at the conclusion of Plaintiffs' proof, the Court granted Defendants' motions under Rule 50 for judgment as a matter of law. (R. 250; Bench ruling, TR. 725-749.) On October 22, 1993, a final judgment was entered dismissing the action with prejudice and terminating the case. (R. 251.)

On October 28, 1993, Plaintiffs filed a motion for new trial (R. 257), which was denied on December 30, 1993. (R. 262.) On January 28, 1994, forty (40) of the Plaintiffs filed a notice of appeal. (R. 263.)

STATEMENT OF FACTS

Plaintiffs were employed for many years by Stauffer Chemical Company at two plants in Maury County, Tennessee. Plaintiffs were members of Local 912 and as a condition of membership, automatically became part of the International Union. Their Union dues were split between Local 912 and the International Union. (R. 162, ¶ 11; TR. 322, 323, 342, 368; Ex. P-7.)[2]

Prior to 1982, there was a single collective bargaining contract governing both plants. Employees, including Plaintiffs,

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[2]Exhibits are listed as filed on motions. In the appendix designation, the trial number, if applicable for the same exhibit, is listed in parenthesis.

frequently switched from plant to plant. One plant manufactured phosphorus and was known as the "furnace plant". The other manufactured pesticides and was known as the "organic plant". (R. 171, memorandum of the Court, 2; TR. 322, 325, 335, 371, 438, 439, 443, 561, 562; Ex. P-7.)

In 1982, Stauffer Chemical Company insisted that the two plants be under separate Collective Bargaining Agreements. The employees wanted to retain separate contracts but in any event, they wanted to retain all of their transfer rights between the two plants. The employees finally agreed to separate contracts on condition that employees who had seniority to transfer between the two plants as of that date should retain a one time transfer right to the other plant. Because of the importance of the issue, Local 912 requested the assistance and participation of the International Union. A separate written

agreement referred to as the "Memorandum Agreement of September 13, 1982", was entered into to promise Plaintiffs and other qualifying employees a one time right to transfer to the other plant in the event of layoff at the other plant. This agreement was commonly referred to as the "Cross-Bumping Agreement". (R. 171, memorandum of the Court, 2, 3; TR. 333, 336; Ex. P-7, Ex. P-52, Ex. P-55.)

At the same time, separate Collective Bargaining Agreements were executed for the two plants. The 1982 Collective Bargaining Agreement for the furnace plant was executed on behalf of the furnace plant and by the negotiating committee for the furnace plant. The 1982 Collective Bargaining Agreement for the organic plant was executed by the organic plant and by the negotiating committee for the organic plant. The separate 1982 Collective Bargaining Agreements for the

two plants both listed the Cross-Bumping Agreement as being included by reference. The Cross-Bumping Agreement was signed separately by the employer on behalf of the furnace plant and organic plant. The negotiating committees for both plants signed the Cross-Bumping Agreement on behalf of their respective bargaining units. (R. 171, memorandum of the Court, 4; TR. 331, 337; Ex. P-26, Ex. P-27, Ex. P-28.)

The Cross-Bumping Agreement provides in full as follows:

> Local Union No. 912, International Union of Operating Engineers and Stauffer Chemical Company for its Phosphorus Products Plant (Furnace) and its Intermediate Agricultural Chemicals Plant (Organic), both located at Mt. Pleasant, Tennessee do hereby agree that:
>
> 1. Employees hired prior to September 11, 1982 may exercise layoff rights as described below with the exception of current

furnace plant employees who do not have the seniority to displace current employees at the organic plant.

2. Employees shall first exhaust their rights under the layoff procedures described in the collective bargaining agreement covering the plant to which they are assigned.

3. Employees of either plant covered by this Memorandum of Agreement who are to be laid off from their plant may then displace junior employees in the other plant provided that:

a. the employee displaced shall be the junior employee in the classification.

b. The employee must qualify for such classification after a reasonable training period at the organic plant or a period of fifteen (15) working days or less at the furnace plant. If the employee fails to qualify, he will not be

allowed to make further choices of jobs but rather will be laid off.

4. Employees who elect to move from one plant to another will become an employee of the plant to which they have moved and will have no further rights to return to the other plant.

5. Employees who are given the opportunity to exercise their rights under this Memorandum of Agreement and who decline to do so shall forfeit future rights under this Agreement. (Ex. P-28.)

Local 912 represented both bargaining units in the 1982 negotiations. Local 912 continued to represent both bargaining units after the execution of the Cross-Bumping Agreement establishing conflicting interests between the two bargaining units. Prior to 1991, employees at the organic plant had exercised transfer

rights to the furnace plant under the Cross-Bumping Agreement. (TR. 573; Ex. P-7.)

The International Union, at the request of Local 912, participated in the 1982 negotiations and in the subsequent negotiations in 1985 and 1988 for both plants. During the 1985 negotiations, Stauffer Chemical Company attempted to terminate the Cross-Bumping Agreement. However, both bargaining units refused and the Cross-Bumping Agreement was listed and incorporated by reference into the separate 1985 Collective Bargaining Agreements for the organic plant and the furnace plant. (TR. 337-339; Ex. P-53, Ex. P-54, Ex. P-55.)

In 1987, ICI purchased both plants and operated them under the 1985 Collective Bargaining Agreements. Later in 1987, ICI sold the furnace plant to Rhone-Poulenc but retained the organic plant and continued to operate it under the 1985 Collective

Bargaining Agreement executed by Stauffer Chemical Company. (R. 162, ¶¶ 35-40, 102; TR. 340.)

In the 1988 negotiations for the organic plant, ICI also attempted to terminate the Cross-Bumping Agreement. However, the bargaining unit for the organic plant refused and the parties agreed on the 1988 ICI Collective Bargaining Agreement which expressly listed and incorporated by reference the Cross-Bumping Agreement. (R. 162, ¶¶ 55, 56; Ex. P-7.)

Rhone-Poulenc, after purchasing the furnace plant, operated under the 1985 Stauffer Chemical Company Collective Bargaining Agreement from December 2, 1987, until October 13, 1988, and was a successor to Stauffer Chemical Company under that Collective Bargaining Agreement. (R. 162, ¶ 102; TR. 524.) Rhone-Poulenc, in an internal memorandum dated 9/13/88, by its chief

negotiator, G.L. Suydam, analyzed the Cross-Bumping Agreement in preparation for the 1988 negotiations. (TR. 562; Ex. P-4.) The memorandum of 9/13/88 provided in pertinent part as follows:

> I reviewed the cross bumping agreement with Bob Stringer, Personnel Manager at the ICI plant. He was very helpful and knowledgeable.
>
> ...
>
> - The affected employees are more numerous than I imagined. Bob prepared the list attached 10/9/87. It is a combined seniority list of the two plants which showed 154 furnace plant employees and 117 organic plant employees as potentially having the seniority described in the agreement. On today's Furnace Plant Seniority list there remain 135 employees with the seniority described in the agreement.
>
> - I have tried to analyze four positions relative to this problem.

1. Do nothing -- This position relies on the two principles that neither company considers the cross bumping agreement as enforceable and if contested the resolution of the problem will be smaller in the future than it will be today. As we have discussed, the liability, if any, rests with the Company that lays off and cannot force the remedy of the Agreement on the opposite Company. Therefore, our worst case scenario would be a plant closure. In that scenario we would have to give the newly legislated 60-day notice, negotiate terms for closing and also negotiate resolution to the cross bumping agreement. In that we would not be able to provide the jobs it calls for, a monetary solution would

likely result either through negotiation, arbitration or litigation.

2. Negotiate the Agreement out -- If the cross bumping agreement represents a significant liability to the Company it then must also represent a significant asset to the employees. We must be resolved to make a monetary offer or severance arrangement to compensate this difference if negotiations are to be successful.

3. Negotiate and fail - pre strike -- If the Company raises the issue and capitulates as ICI did in January, we will have reduced our future argument that the agreement cannot be enforced. ICI verbally disclaimed their acquiescence but

nevertheless signed the existing agreement.[3]

Thereafter during the 1988 negotiations, Rhone-Poulenc submitted the following Proposal A to the bargaining unit which was rejected:

> The Memorandum of Agreement dated 9/13/82 and referenced in the ARTICLE XVI, SECTION II of the Agreement is amended with this Memorandum of Agreement.
>
> Anyone who is not an employee of the Stauffer Chemical Company, Division of Rhone-Poulenc, Inc., Mt. Pleasant, Tennessee, Furnace Plant, as defined in ARTICLE I, SECTION I will not be allowed to displace or exercise seniority over employees of the Company. (TR. 562-564; Ex. P-1, Ex. P-2.)

Rhone-Poulenc then submitted the following Proposal B which was also rejected by the negotiating committee:

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[3]Underlining supplied.

> This Memorandum of Agreement dated 9/13/82 and referenced in the Collective Bargaining Agreement was discussed and affirmed in open negotiations.
>
> Employees of ICI Americas Mt. Pleasant Plant who possess the seniority described in the 9/13/82 Memorandum of Agreement may exercise such seniority in the Mt. Pleasant Furnace Plant by displacing employees of the Company when they become eligible under that Memorandum.
>
> Employees of the Mt. Pleasant Furnace Plant who seek to exercise their seniority in ICI Americas's Mt. Pleasant Plant rely solely on the commitment of ICI Americas to this 9/13/82 Memorandum of Agreement. The Parties understand that Stauffer Chemical Company, Division of Rhone-Poulenc will not be responsible for its former employees in these efforts nor will there be any other remedy by Stauffer/Rhone-Poulenc. (TR. 564, 565; Ex. P-1, Ex. P-3.)

Rhone-Poulenc then took the position that if the negotiating committee for the bargaining unit would not amend the Cross-

Bumping Agreement, it must affirm the agreement. Mr. Suydam stated the reason for such an affirmance was so the employees would know that the negotiating committee had refused to amend the Cross-Bumping Agreement if employees from the organic plant replaced them by transferring under the Cross-Bumping Agreement. (TR. 566, 567; Ex. P-1, Ex. P-29.)

The parties then entered into the following agreement dated October 13, 1988, for the purpose of affirming the Cross-Bumping Agreement:

> The Company will have fulfilled all obligations under the Collective Bargaining Agreement when its employees have been layed [sic] off under Article VIII, Seniority, or when its employees have been layed [sic] off under the terms of the 9/13/82 Memorandum of Agreement as it pertains to I.C.I. (Organic Plant). (TR. 567, 568; Ex. P-14.)

The final 1988 Collective Bargaining Agreement for the furnace plant

expressly incorporated by reference the Cross-Bumping Agreement without change. The succeeding 1991 contract for the furnace plant again expressly incorporated the Cross-Bumping Agreement by reference and Rhone-Poulenc is operating under the 1991 contract today. (TR. 343-367, 381, 626, 627.)

It was the position of Local 912 during the 1988 negotiations that one bargaining unit could not affect the rights of the other bargaining unit. Local 912 had taken this same position since 1982 and continued to so advise the employees of both bargaining units after 1988. ICI always took the position that it was never at any time bound by the Cross-Bumping Agreement even though it had signed the 1988 contract for the organic plant expressly incorporating the Cross-Bumping Agreement. (TR. 346, 347, 350, 351, 443, 444, 570-573; Ex. P-7, Ex. P-14, Ex. P-17 at 37, 109, 122, 134-144, Ex. P-18 at

102-105, 116, 120, 132, 145, 149, 202, Ex. P-19 at 53, 54, 60-63, 69,85, 86, 100, 101.)

On June 20, 1990, Rhone-Poulenc announced the planned closing of the furnace plant with layoffs to begin in February of 1991. At the same time, Rhone-Poulenc issued a planning calendar providing in part as follows:

6-20-90	Coordinated announcements to employees at Globe and Furnace Plants of curtailment of production and timetables. Press releases made to local media.
...	
12-1-90	Announce manning table for February layoffs. A 60-day notice is required.
...	

2-1-91 Activate layoff, allow ten working days for bumping. (Ex. P-12, Ex. P-30.)

As a result of the announced closings, Local 912, in a letter dated June 26, 1990, to the International Union, requested guidance and an interpretation of the Union's Constitution. That letter of June 26, 1990, provided in part as follows:

> ...
>
> The work force for the Organic Plant came out of the Furnace Plant's work force and was, therefore, under the same contract as was the Furnace Plant with Local 912...
>
> The Furnace plant (elemental phosphorus) grew to a work force number of about 250. The Organic plant grew to about 125.
>
> ...
>
> In the negotiations in September of 1982 for a new contract, Stauffer took a firm position that it was going to separate the two plants, the Furnace and

Organic, and have a separate contract for each plant, since they were under two different divisions of the Company - the Chemicals Division at the Furnace plant (elemental phosphorus) and the Agricultural Division at the Organic Plant.

Since the Organic plant was staffed primarily from the Furnace plant, there was a major concern among each committee at each plant, about "bumping or rolling" between each plant in case of a reduction in force. The parties thus negotiated a "Memorandum of Agreement" and made it a part of each plant's contract, by reference, (See the included Memorandum) for those employees hired prior to September 11, 1982.

In June 1988, Local 912 negotiated a three-year contract with ICI Americas - the old Stauffer Organic plant. ICI tried to negotiate out the Memorandum of Agreement. The Union would not agree to let them. The company's final position was that the Company would not honor the Furnace Plant's employees bumping to the ICI (Organic) plant. The Memorandum of Agreement was left in ICI's Organic plant

Contract. The Union's position was that unless and until the Memorandum was negotiated out at both affected plants - the Furnace and Organic - the Agreement was still valid and, Organic (ICI) employees could bump to the Rhone-Poulenc's Furnace Plant when applicable.

When Local 912 negotiated the Furnace plant contract in 1988 with Rhone-Poulenc, the Furnace plant Management wanted to delete the Memorandum of Agreement. Again the Local was successful in keeping the right of the Furnace plant employees to bump to ICI's Organic plant.

...

The dilemma that Local 912 now has is that two separate entities, each with a contract with Local 912, has a contractual right to "bump" into the other plant as a last resort. The end result thus will be that those with enough seniority at Rhone-Poulenc's Furnace plant will by the Memorandum of Agreement bump or roll those less senior at ICI's Organic plant. ICI's employees will then be laid off.

The fact that this has created much controversy is an understatement. ICI's employees are very disgruntled and will probably try, encouraged by their Management, to negate and nullify the Memorandum of Agreement that permits Rhone-Poulenc's employees to bump them.

There is no question in my mind that either ICI's or Rhone-Poulenc's employees can, by following the proper procedure, negotiate away their Unit's right to go to the other plant. This was my position in the 1988 Negotiations at each Company. However, my position in the 1988 Negotiations was that neither Unit acting alone could negate or nullify the other Unit's right to exercise the bump or roll created by the Memorandum of Agreement negotiated in 1982, that this would have to be done jointly.

My questions to you for your interpretation of IUOE's Constitution under Article XXIV, Subdivision II, Section (e), page 105, is:

Can either ICI's employees or Rhone-Poulenc's employees, two separate entities under two separate contracts, now,

> acting alone, negotiate away the other entities rights under the Memorandum of Agreement dated September 13, 1982? If not, must there be a joint venture or negotiations to modify, negate or nullify the Memorandum, since the Membership affected includes both entities?
>
> ...
>
> From a logical standpoint, Rhone-Poulenc's employees, and 912's members, which is a larger Unit than ICI's, will not modify or relinquish its right to bump or roll ICI's employees, and in all probability will not even agree to a joint negotiations.
>
> On the other hand, ICI's employees, also 912's members under a separate contract and a much smaller unit, (125 versus 280) goaded by ICI's Management, will in all probability try everything possible to frustrate, circumvent, and/or prevent Rhone-Poulenc's employees from bumping them. (TR. 468-476; Ex. P-7.)

By letter of July 27, 1990, the International Union made the following

response to Local 912's letter of June 26, 1990:

> Reference is made to your June 26, 1990 letter to me concerning a memorandum of agreement contained in two collective bargaining agreements IUOE Local Union No. 912 has at separate plants, one owned by ICI Americas Inc. and the other owned by Rhone-Poulenc, Inc. The memorandum of agreement gives employees at each plant the right to bump or roll employees at the other plant under certain circumstances. Apparently, one of the plants is scheduled to be closed and questions have arisen about the rights of the employees under the terms of the memorandum of agreement. You requested by interpretation of Article XXIV, Subdivision 11, Section (e) of the International Constitution as to which employees should be allowed to vote on the resolution of these questions.
>
> Article XXIV, Subdivision 11, Section (e) provides, in pertinent part, that:
>
> > Proposed collective bargaining agreements and modifications

thereof may be negotiated for Local Unions by the Business Manager, by a committee, by the Local Executive Board, or by the Business Representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected...

However, the situation described in your letter does not require an interpretation of this section of the Constitution. In your situation, the rights of the employees to bump and roll from one plant to the other are governed by the provisions of an existing memorandum of agreement. Since this memorandum of agreement is already in existence and has been in existence for some time, it is not a "proposed agreement or modification thereof" requiring additional

> membership approval now. Thus, there is no need to determine at this time what set of members constitute the "membership affected" that would be entitled to vote on a "proposed agreement or modification thereof." (TR. 477, 478; Ex. P-8.)

Local 912, through its business manager, James B. Kincade, conferred with its attorney, Dewey Branstetter, about its letter of June 26, 1990. Mr. Kincade also continued to seek advice and assistance from the International Union, including its legal staff. (Ex. P-10.)

On October 16, 1990, Local 912 filed a declaratory judgment action against ICI and Rhone-Poulenc requesting the Court to determine the validity of the Cross-Bumping Agreement and rights of the employees thereunder. By letters of that same date, October 16, 1990, Local 912 notified ICI and Rhone-Poulenc that as they had previously

discussed, Local 912 was filing a "friendly lawsuit". (Ex. P-34, Ex. P-35, Ex. P-36.)

The complaint in the declaratory judgment action alleged that the Cross-Bumping Agreement remained intact in the current ICI contract (¶ 8) and also remained intact in the Rhone-Poulenc contract (¶ 9). In its answer, ICI admitted the Cross-Bumping Agreement was referred to in its current contract but denied it became part of its contractual obligations. In its answer, Rhone-Poulenc admitted the allegations of ¶ 9 of the complaint. (Ex. P-36, Ex. P-37, Ex. P-38.)

On the same day the complaint was filed, Rhone-Poulenc, in a letter to ICI dated October 16, 1990, concerning availability of its employees, stated in part as follows:

> Due to economic reasons, our operation will be going through a "phase down" which will conclude, in early 1993, with the shutdown of the Mt. Pleasant Furnace Plant.

> Beginning in February, 1991, we will begin a series of layoffs to coincide with the various stages of production curtailment. (Ex. P-5.)

On November 19, 1990, Rhone-Poulenc issued a memorandum concerning availability of skilled employees which provided in part as follows:

> The Mt. Pleasant Phosphorus Plant in Tennessee is scheduled for curtailment and eventual shut down beginning with the reduction of approximately 140 employees in February, 1991. (Ex. P-33.)

The complaint in the declaratory judgment action further alleged that Rhone-Poulenc had "announced its intentions to close the furnace plant and began laying off employees in February, 1991". (¶¶ 10 and 11). Rhone-Poulenc admitted ¶ 10 but in response to ¶ 11, denied that it had "announced a specific date on which it plans to begin laying off employees from the furnace plant". This

allegation in the answer was the first indication given by Rhone-Poulenc that it might delay the layoffs. (R. 171, memorandum of the Court, 9; Ex. P-5, Ex. P-36, Ex. P-37, Ex. P-31, Ex. P-32, Ex. P-17 at 37, 41, Ex. P-18 at 130.)

In a letter dated December 12, 1990, ICI stated in part as follows:

...

> ...First, as I am sure the Union knows, the collective bargaining agreement expressly requires the Union to follow the grievance procedure and complete the arbitration process as to <u>all</u> disputes relating to interpretation of the contract...No grievance can be filed at this point because there is nothing to grieve. No layoffs have occurred and, as Rhone-Poulenc has now stated in its Answer, it has not even decided on any time frame for any layoffs to begin.
>
> Second, the lawsuit would be dismissed for the additional reason that the law regarding declaratory judgments requires that there

exist an actual "controversy" between the parties, and none exists here...Thus, the only controversy revealed by the complaint is one between the Rhone-Poulenc employees and the ICI employees, both of which groups the Union is supposed to represent. Unless and until the Union files in court a document claiming that the ICI employees (who the Union represents) should lose their jobs to laid off Rhone-Poulenc workers, there is no controversy between ICI and Local 912,[4] and the case must be dismissed. We believe there is a serious question as to whether the officers of Local 912 are really ready to state in writing that ICI's workers should be put on the street in order to make way for laid off employees with lesser skills who are employed by another company.

...Until the Union files a public document with the Court claiming that a refusal to throw ICI workers out of their jobs will violate the contract, the Court has no authority to hear the lawsuit. Of course, Local 912's representatives also would need to testify that

[4]Underlining supplied.

they believe the ICI employees should be forced to give up their jobs to employees from Rhone-Poulenc[5] if Rhone-Poulenc's plant closes.

...In this regard, please note that paragraph 11 of Rhone-Poulenc's Answer "denies that it has announced a specific date on which it plans to begin laying off employees from the Furnace Plant." Because the Union will be unable to show that the enforceability of the 1982 document will come into question prior to June, the case is not a proper declaratory judgment action and must be dismissed.

...

While negotiations obviously must result in elimination of any reference to the September 13, 1982 Memorandum of Agreement, as well as the other obsolete and unenforceable side agreements, ICI is prepared at the same time to negotiate a preferential hiring arrangement whereby laid off Rhone-Poulenc workers, meeting agreed qualifications, would be

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[5]Underlining supplied.

hired at the Organic Plant as the Specialties group creates new employment opportunities in the future.

To summarize, we believe that if Local 912 continues its lawsuit, the result will be as follows:

1. The lawsuit will be dismissed;

...

4. ICI employees will be angry with Local 912 representatives for pursuing an action designed to force them out of their jobs; and
5. Rhone-Poulenc employees will be angry with Local 912 representatives for giving up the chance to obtain preferential hiring rights with ICI.

...

In light of these factors, we recommend that your client seriously consider ICI's proposal. My instructions are to seek an early response and, absent meaningful progress toward agreement, to aggressively pursue dismissal of the

lawsuit. (Ex. P-6.) (Underlining supplied.)[6]

Local 912 did not inform the Plaintiffs or any member of the bargaining unit for the furnace plant of the above settlement offer. Thereafter, Rhone-Poulenc postponed the layoffs scheduled for the beginning of February, 1991, until the beginning of July, 1991.[7] No party to the declaratory judgment action filed a motion for summary judgment or motion to dismiss in that action. (R. 162, ¶¶ 63-67; R. 171, memorandum

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[6]This letter was produced by ICI Americas Inc. in response to discovery. Rule 408 of the Federal Rules of Evidence does not require exclusion of the document since it is not offered to prove liability of ICI Americas Inc. under the Cross-Bumping Agreement. It is offered for "another purpose" within the meaning of Rule 408; that is, on the issues of conspiracy, conflict of interest, breach of trust, tortuous interference with legal rights and bad faith of the Union. Friedus v. First National Bank, 928 F.2d 793, 794, 795; Bituminous Const., Inc. v. Rucker Enterprises, Inc., 816 F.2d 965, 968, 969 (4th Cir. 1987). Moreover, only the offeror is protected by Rule 408 and the protection does not extend to the offeree. Crues v. KFC Corp., 768 F.2d 230 (8th Cir. 1985).

[7]The first written document by Rhone-Poulenc stating the layoffs would be delayed, is the memorandum of March 7, 1991. (Ex. P-13.)

of the Court, 9; Ex. P-1, Ex. P-14, Ex. P-19 at 72-78, Ex. P-18 at 138, 150, 151, 184.)

Immediately after the announcement of the closing of the furnace plant, the organic plant employees were in favor of removing the Cross-Bumping Agreement from their Collective Bargaining Agreement to try to prevent furnace plant employees, including Plaintiffs, from displacing them. Local 912 talked the organic plant employees out of making a proposal to remove the Cross-Bumping Agreement by telling them they should let ICI make that proposal. (R. 162, ¶ 98; Ex. P-7, Ex. P-17 at 37, 121-124, Ex. P-18 at 118-121, 126.)

During the period after the announcement from June of 1990 through the execution of the new ICI contract on June 11, 1991, Local 912 continually represented to the employees of the furnace plant, including Plaintiffs, that they did not have to be

concerned about the ICI negotiations because the organic plant bargaining unit could not affect their rights. Thereafter, the organic plant bargaining unit agreed with ICI to delete the Cross-Bumping Agreement from the new 1991 ICI contract. (R. 162, ¶¶ 73, 74; TR. 346, 347, 350, 351, 443, 444, 570-573; Ex. P-14, Ex. P-17 at 107-109, 114-116, 160, 161, 167, Ex. P-40, Ex. P-41.)

No member from the bargaining unit at the furnace plant was permitted to participate in the negotiations relating to the organic plant. No member of the bargaining unit from the furnace plant ever agreed to or authorized the deletion of the September 13, 1982, agreement. The June, 1991 agreement between ICI Americas Inc. and Local Union No. 912 was never authorized or approved by, nor submitted to, the bargaining unit for the furnace plant. (Paragraph 17 of complaint

as admitted by answer of Local 912.) (R. 1, R. 23; TR. 352, 569, 571, 572.)

Shortly after the execution of the June 11, 1991, ICI contract, at the next Union meeting, Local 912 informed the Plaintiffs for the first time that their rights under the Cross-Bumping Agreement had been terminated by the agreement between ICI and the bargaining unit for the organic plant. If Plaintiffs had known earlier that their rights could be given up by the organic plant bargaining unit, they would have insisted on participation. They had the numerical strength, 250 to 125, to outvote the organic plant bargaining unit. (R. 162, ¶¶ 78, 79; TR. 353, 364, 370, 431, 447, 448, 571; Ex. P-9, Ex. P-10, Ex. P-17 at 37, 125-127, Ex. P-18 at 94, 95, Ex. P-19 at 15, 16, 18, Ex. P-40, Ex. P-41.)

Local 912 also informed Plaintiffs that on the advice of the Union's attorney, the declaratory judgment action was being

dropped. The Local Union refused to furnish Plaintiffs at that time a copy of the attorney's letter. One of the Plaintiffs, Terrance Nevette, called the attorney and requested information. The attorney refused to discuss the matter with him, stating that there was a conflict of interest because he represented the Local Union. Thereafter, layoffs began in the first week of July. (TR. 431, 432, 436, 448, 449, 450, 571; Ex. P-9, Ex. P-10.)

Immediately after the execution of the June 11, 1991, ICI contract, the parties to the declaratory judgment action dismissed that action by agreement. On June 11, 1991, the attorney for Local 912 had received a copy of the G.L. Suydam memorandum of 10/13/88 recognizing Rhone-Poulenc's potential liability if it laid off employees and could not force ICI to accept them. (R. 162, ¶¶ 79-81, 101; Ex. P-42.)

Plaintiffs duly presented grievances to both ICI and Rhone-Poulenc. Local 912 refused to participate in the grievance against ICI. Although advising Plaintiffs not to file a grievance, it did assist Plaintiffs in drafting a grievance against Rhone-Poulenc. ICI returned the grievance submitted by Plaintiffs to Local 912 stating that it had no contract with these employees. (R. 162, ¶¶ 82-84; TR. 353, 355, 362, 392-400, 437; Ex. P-9, Ex. P-10, Ex. P-43, Ex. P-45, Ex. P-47, Ex. P-62.)

Plaintiffs, through Waylon Carroll and Terrance Nevette, requested assistance from the General President of the International Union by letter of July 10, 1991. That letter provided in part as follows:

> We, the members of IUOE Local 912 are concerned about whether our interests were represented by our Union Representative, James Kincaid [sic]. We feel that we have

> been misled as well as misrepresented...We feel that Local 912 has a conflict of interest by representing both plants.
>
> ...
>
> We would appreciate anything you could do for us, as our union seems to be working against our best interest. There are many people who have worked at the plant 10-35 years, who will be left with nothing. We have enclosed our Second Stage Grievance against both ICI and Rhone-Poulenc. (TR. 363, 364, 444-447; Ex. P-9.)

By letter of July 16, 1991, Local 912, in a letter to the International Union, commented on Plaintiffs' letter of July 10, 1991, in pertinent part as follows:

> ...
>
> In substance the disgruntled members have three complaints: One, the roll or bumping issue and the alleged conflict of interest by Local 912, IUOE, representing both plants in the controversy; two, the Union's refusal to give a copy of its attorney's letter withdrawing its "Declaratory Judgment Suit"

to one or more of the disgruntled members; and, three, the opening of Rhone-Poulenc's (the old Stauffer Furnace Plant) contract with Local Union 912, which expires 15 August 1991.

As to the first complaint, on June 26, 1990, I, James B. Kincade, wrote you a letter (copy enclosed, numbered Document #1) explaining the dilemma that Local 912 faced requesting your interpretation and counsel in the matter. On 27 July 1990 you responded by letter, a copy of which is attached to my June 26 letter. In addition, I have talked with Richard Griffin and Helen Morgan in IUOE's legal department as to the general problem involved.

After talking with Dewey Branstetter, Jr. of the Nashville law firm of Branstetter, Kilgore, Stranch and Jennings, it was decided that the proper route to go was with a declaratory judgment lawsuit...

...

Although I recommended the members not go the grievance route in the controversy, because of the obstacles apparent, I drafted the

> written grievance for them, requesting they wait until the lay-off occurred before grieving. (The grievance was attached to Nevette's and Carroll's letter faxed to you dated 10 July 1991.)
>
> The problems with the grievance route are many and gets back into the legal arena. One question is obvious. Suppose Rhone-Poulenc grants the grievance! How can Local 912 make ICI take the employees from Rhone-Poulenc. <u>If Local 912 goes to court in an effort to do so, where does that leave Local 912 with its members at ICI as to fair and proper representation? This is one of the dilemmas I discussed with Branstetter, our attorney. This is one of the reasons he recommended against the grievance route</u>.[8]...I have sought guidance from your office and IUOE's legal department as well as Local 912's Attorneys. (TR. 367, 458-467; Ex. P-10.)

By letter of August 5, 1991, the International Union responded as follows to Plaintiffs' letter of July 10, 1991:

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[8]Underlining supplied.

> After reviewing this matter, I have determined that the referenced agreements were entered into by the Local Union as exclusive bargaining representative for the respective bargaining units, and that the International Union is not a party to those agreements. Accordingly, the International Union is without authority to alter or amend the terms of those agreements nor intervene in the subject matter of your letter. Be further advised, however, that it appears that Local Union No. 912 has acted vigorously and in good faith in this matter to protect the interests of all members covered by the applicable collective bargaining agreements. (TR. 364, 365, 368, 451, 452; Ex. P-44.)

Thereafter, a large number of Plaintiffs were laid off in September of 1991. On September 27, 1991, Plaintiffs resubmitted the grievance to Rhone-Poulenc. Plaintiffs attempted to resubmit the grievance to ICI but it was refused. (TR. 392, 393, 396, 355, 437; Ex. P-62.)

On September 27, 1991, Local 912 unilaterally without Plaintiffs' participation discontinued the grievance against Rhone-Poulenc and notified Waylon Carroll, one of the Plaintiffs laid off effective September 27, 1991, that Local 912 would take no further action. Thereafter, Plaintiffs duly filed this suit. (R. 162, ¶ 106; TR. 362, 363, 427-432; Ex. P-48, Ex. P-60, Ex. P-62.)

After their layoffs, certain Plaintiffs accepted severance pay from Rhone-Poulenc. In exchange, they signed a waiver of certain obligations against Rhone-Poulenc. When the severance pay agreement was negotiated in April of 1991, Plaintiffs insisted that it include the following provision concerning transferring to the organic plant:

> Qualifying for a position at the Organic Plant will make an individual ineligible under this Memorandum whereas failure to qualify for a position at the Organic Plant

will not make an individual ineligible. (TR. 626; Ex. P-1, Ex. P-17 at 48-50, Ex. P-18 at 165-170, Ex. P-19 at 11-14, 28.)

Employees who were not covered by the Cross-Bumping Agreement received the same severance pay as Plaintiffs. It was the intention of Plaintiffs by inserting the above quoted provision to not surrender their transfer rights by accepting severance pay. The severance pay agreement further provided:

> B. Prior to and as condition for receiving severance pay and other special considerations still due the employee under this Memorandum of Understanding, the employee whose seniority and employment with the Company is terminated under this Agreement shall sign a statement (a copy of which is attached) which acknowledges his/her receipt of said payments and benefit plan coverages and releases the Company from any and all pending and future obligations and liabilities arising out

> of employment with the Company, except for any unemployment compensation or worker's compensation claims that may be made and except as provided under the terms of this Memorandum of Understanding. (R. 162, ¶¶ 87, 107, 108; TR. 626; Ex. P-1, Ex. P-17 at 48-50, Ex. P-18 at 165-170, Ex. P-19 at 11-14, 28.)

The Union Constitution (Ex. P-51; TR. 530-532, 559-561) provides as follows:

1. It is "a contract between the member, his Local Union, the International Union and every other member therein" (pp. 87, 88).

2. The "organization shall be known as the International Union of Operating Engineers" (p. 5).

3. One of its purposes is to assist "Local Unions in negotiating collective bargaining agreements" (pp. 5, 6).

4. The International Union has the power to "issue charters for Local

Unions", "suspend and revoke any of said charters", "supervise the operation of Local Unions", "appoint supervisors and receivers when necessary", "prefer charges against Local Unions", "order trials with authority to discipline those affected", "adopt as part of the Constitution a procedure for the government and regulation of Local Unions", "provide for the general welfare of the organization and its members", "take all steps necessary to protect the interest of the organization", and "all other rights, powers, privileges and immunities not herein specifically denied" (pp. 9-11).

5. The International Union, through its General President, has the duty to interpret the Constitution "and decide questions of law arising thereunder" (Article VI(2) - p. 21) and has the "power to require Local Unions...and members to comply with this Constitution and any lawful rulings or orders

of the International Union" (Article VI(3) - p. 22).

6. The International Union, through its General President, for the purpose of "assuring the performance of collective bargaining agreements or other duties of a bargaining representative"[9] has "full power to suspend or remove such Local Officers, suspend or revoke charters of such Local Unions or place such Local Unions and their officers and members under International Supervision" (Article VI(3) - p. 22).

7. The General President "shall be strictly accountable and responsible for the faithful performance of his duties and shall administer and enforce every law, rule, regulation and requirement of the Constitution, Ritual and Obligation" (Article VI(5) - pp. 23, 24).

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[9]Underlining supplied.

8. The Constitution provides for dues, taxes and assessments (pp. 30-34).

9. Collective Bargaining Agreements and modifications thereof "shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected" (Article XXIV(11)(e) - p. 105).

12. Copies of all Collective Bargaining Agreements and modifications thereof "shall be filed with the General President immediately after execution" (p. 105).

The International Union was directly involved in the negotiation of the 1982 Cross-Bumping Agreement. The Interim Agreements for both plants at the conclusion of the 1982 negotiations were signed on behalf of both the International and Local 912. The International Union also participated in the

1985 and 1988 negotiations. (Ex. P-19 at 92-99, 102, Ex. P-18 at 96-101, 116, 117, 133-137, 176-183; Ex. P-26, Ex. P-27, Ex. P-28, Ex. P-52-55.)

The International Union regularly participated in grievance procedures under Collective Bargaining Agreements. Moreover, in Article XI of the various Collective Bargaining Agreements for the furnace and organic plant, in referring to Union representatives, states that "[a]n International Representative of the Union...shall when necessary have the use of an office at the plant during working hours for the purpose of investigating grievances". (Ex. P-18 at 96-101, 116, 117, 133-137, 176-183; Ex. P-19 at 92-99, 102, Ex. P-51, Ex. P-55, Ex. P-58, Ex. P-59.)

The annual report to the filed by the International Union with the United States Department of Labor shows, as of 12/31/91, net

assets after liabilities of $74,293,165.00. The annual report of Local 912 filed with the United States Department of Labor shows, as of 6/30/91, net assets after liabilities of $171,243.00. (Ex. P-57, Ex. P-56.)

ARGUMENT

I. THE CONSPIRACY OF THE DEFENDANTS.

The corporate Defendants exploited the conflict of interest situation the International Union and Local 912 found itself. The Union, both Local 912 and the International, was induced to breach its contractual and trust obligations to Plaintiffs. Conspiring for such a purpose is clearly illegal. Allen v. Allied Plant of Nashville, 881 F.2d 291 (6th Cir. 1989); Koehler v. Cummings, 380 F.Supp. 1294, 1313 (M.D. TN 1974).

Pertinent sections of the Restatement are as follows:

RESTATEMENT, SECOND, CONTRACTS

Section 193. Promise Inducing Violation of Fiduciary Duty.

A promise by a fiduciary to violate his fiduciary duty or a promise that tends to induce such a violation is unenforceable on grounds of public policy.

Section 194. Promise Interfering with Contract with Another.

A promise that tortiously interferes with performance of a contract with a third person or a tortiously induced promise to commit a breach of contract is unenforceable on grounds of public policy.

RESTATEMENT, SECOND, TRUSTS

Section 170. Duty of Loyalty.

(1) The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.

(2) The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate

> to him all material facts in connection with the transaction which the trustee knows or should know.[10]

The facts herein indicate that the Union and the corporate Defendants acted in concert and conspired with each other to deprive Plaintiffs of their vested contractual rights. All of the Defendants must have realized that their best hope of escaping their clear legal obligations was to let ICI agree with its own employees to delete the 1982 Cross-Bumping Agreement. After all, ICI would be making its agreement with its employees who would be displaced by Plaintiffs.

ICI, in its letter of December 12, 1990, stated it would aggressively pursue dismissal if the parties could not secure a prompt agreement. Since none of the parties actively pursued dismissal or resolution of

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[10] 29 U.S.C. 501(a) defines the fiduciary status of the Union. See also Brotherhood of Locomotive for Firemen v. Mitchell, 190 F.2d 308 (5th Cir. 1951).

the declaratory judgment action, it is obvious they reached some type agreement. The delay of the layoffs, the false representations to Plaintiffs by the Union, the correspondence between the Defendants, the circumstances of the declaratory judgment action and the June expiration date of the ICI contract all indicate conspiracy. The reasonable inferences to be drawn from the uncontroverted facts are more than sufficient to withstand a motion for summary judgment. Davidson & Jones Development Company v. Elmore Development Co., Inc., supra, 921 F.2d at 1349 (quoting United States v. Diebold, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)).

II. LIABILITY OF ICI.

In 1982, ICI's predecessor, Stauffer Chemical Company, wanted to have separate Collective Bargaining Agreements for the two plants rather than the one agreement for both plants in effect up to that date. To

secure the agreement of the employees to the new bargaining units, the employer promised that the employees would have a one time transfer right to the other plant in case of future layoffs. Plaintiffs accepted and fully performed their part of the bargain. From 1982, each plant has had a separate Collective Bargaining Agreement.

It is elementary that such acceptance creates a binding contract. 1 Corbin on Contracts, Sections 49, 63, 70, 71; Restatement, Second, Contracts, Sections 45, 50, 62.[11]

"After an acceptance has become effective, there is no power in either party to revoke or withdraw." 1 Corbin on Contracts, Section 38. Corbin further states that "of course, there is no power or revocation after the requested act has been

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[11] Part performance is sufficient for an acceptance. However, these Plaintiffs fully performed.

fully performed". 1 Corbin on Contracts, Section 49 n. 70. Corbin further states as follows at 4 Corbin on Contracts, Section 779J n. 7 (Supp., 1991):

> A right to future performance that is created by contract is a "contract right" even though the promisor's duty of immediate performance is subject to one or more conditions precedent. Upon fulfillment of the conditions, the right merely becomes unconditional.

The Cross-Bumping Agreement was not signed by Stauffer Chemical Company as a single employer. Instead, the contract was signed separately by both the furnace plant and the organic plant. From that moment, it was a vested liability of each plant and ICI assumed all those liabilities when it purchased both plants and certainly when it continued to operate the organic plant. Cincinnati Newspaper Guild v. Cincinnati Enquirer, 863 F.2d 439 (6th Cir. 1988); 15 William M. Fletcher, Fletcher Cyclopedia of

the Law of Private Corporations § 7121 (perm ed. rev. vol. 1990).

Moreover, ICI expressly assumed these liabilities when it agreed to the 1988 Collective Bargaining Agreement. The Cross-Bumping Agreement separately existed and was separately enforceable in addition to its enforcement as part of the 1988 Collective Bargaining Agreement. Smith v. Evening News, 83 S.Ct. 267; Hehemann v. E.W. Scripps Co., 661 F.2d 1115, reh. den. 668 F.2d 878 (6th Cir. 1981), cert. den. 456 U.S. 991, 73 L.Ed.2d 1286, 102 S.Ct. 2272; Farmer v. ARA Services, Inc., 660 F.2d 1096 (6th Cir. 1981).

In Hehemann, supra, the employer promised the employees lifetime employment if they would agree to use the new printing equipment. A separate agreement was executed which also incorporated the Collective Bargaining Agreement for purposes of pay and other conditions of employment. In the

renewal Collective Bargaining Agreement, the employment agreement was listed as remaining in effect. The Collective Bargaining Agreement expired in 1981. The Court held that the employment agreement was an existing contract which survived the expiration of the Collective Bargaining Agreement.

The one time transfer rights granted by the Cross-Bumping Agreement were fully vested in Plaintiffs in 1982 and could not be changed by subsequent collective bargaining without the consent and participation of Plaintiffs. The Supreme Court, in United Mine Workers of America Health & Retirement Funds v. Robinson, 455 U.S. 562, at 575, n. 14, 102 S.Ct. 1226, at 1234 n. 14, 71 L.Ed.2d 419, at 430 n. 14 (1982), specifically acknowledged that similar vested contract rights (pensions) may not be altered unilaterally:

> We also recognize [in *Allied Chemical & Alkali Workers v.*

> *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971)] that [retirees] are not without protection: "Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col.L.Rev. 909, 916-920 (1970). The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith v. Evening News Assn.*, 371 U.S. 195, 200-201 [83 S.Ct. 267, 270-271, 9 L.Ed.2d 246] (1962); *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 470 [80 S.Ct. 489, 495, 4 L.Ed.2d 442] (1960)." 404 U.S., at 181, n. 20 [92 S.Ct., at 398 n.20].

This Court, in Weimer v. Kurz-Kasch, Inc., 773 F.2d 669 (6th Cir. 1985), held that such vested contract rights survive the expiration of the underlying Collective Bargaining Agreement. See also Hehemann v. E.W. Scripps Co., supra.

ICI's basic argument is that its contractual obligations to Plaintiffs were superseded by a June, 1991 agreement it executed with a third party, the bargaining unit for the organic plant whose interests were contrary to the interest of the Plaintiffs. This is the same as a contractor arguing that his obligations to pay a provider for past services have been superseded by a contract it entered with a competing provider containing a provision that the contractor did not have to pay the first provider. If ICI wishes to supersede its contractual obligations to Plaintiffs, it must execute such an agreement with Plaintiffs, not with third parties.

This Court has expressly held that whether a right is vested depends upon the intention of the agreement. The parties have full authority in a collective bargaining situation to create vested rights not subject

to future termination. In Re White Farm Equipment Co., 788 F.2d 1186, 1193 (6th Cir. 1986); Policy v. Powell Pressed Steel Company, 770 F.2d 609 (6th Cir. 1985).

Moreover, ICI's contract with a third party to its own employees is void because it was secured by inducing Local 912 to breach trust and contractual obligations to Plaintiffs. Koehler v. Cummings, supra, 380 F.Supp. at 1313. Restatement, Second, Contracts, Sections 193, 194; Restatement, Second, Trusts, Section 170. In any event, there are clear issues of intent, creating a jury issue and making summary judgment inappropriate. Davidson & Jones Development Company v. Elmore Development Co., Inc., supra.

III(a). **LIABILITY OF RHONE-POULENC UNDER CROSS BUMPING AGREEMENT.**

Rhone-Poulenc is admittedly a successor to Stauffer Chemical Company under the 1985 Collective Bargaining Agreement for

the furnace plant. Moreover, Rhone-Poulenc subsequently executed Collective Bargaining Agreements in 1988 and 1991 expressly incorporating the Cross-Bumping Agreement. Rhone-Poulenc is presently operating under the 1991 agreement. The included Cross-Bumping Agreement is crystal clear that Rhone-Poulenc promised Plaintiffs, their employees, a one time transfer right to the ICI Americas Inc. plant in the event Rhone-Poulenc laid them off. Rhone-Poulenc is bound by its promise. Smith v. Evening News, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962); Hehemann v. E.W. Scripps Co., 661 F.2d 1115, reh. den. 668 F.2d 878 (6th Cir. 1981), cert. den. 456 U.S. 991, 73 L.Ed.2d 1286, 102 S.Ct. 2272; Farmer v. ARA Services, Inc., 660 F.2d 1096 (6th Cir. 1981).

The difficulty with enforcing the Cross-Bumping Agreement was foreseeable and indeed known at the time Rhone-Poulenc assumed the 1985 contract and signed the 1988 and 1991 contracts. Thus, the impossibility doctrine

is not applicable but in any event, Rhone-Poulenc failed to carry its burden of proof on this issue. McCalden v. California Library Ass'n, 919 F.2d 538, 543 (9th Cir. 1990) (955 F.2d 1214, 1219); John D. Calamari & Joseph M. Perillo, Contracts, §§ 186, 198 (1970).

The District Court in its earlier memorandum decision of 6/29/93 (R. 171 at 15, 16) stated as follows concerning the impossibility defense:

> The contention of the R-P defendants that merely permitting the plaintiffs to transfer to the organic plant satisfies their obligations is fanciful. Granted, they may have difficulty forcing ICIA to give the plaintiffs jobs at the organic plant, especially since the cross-bumping agreement has been deleted from the organic plant collective bargaining agreement, but the R-P defendants have only themselves to blame. Before their purchase of the Stauffer Chemical Company stock in 1987, ordinary due diligence should have made them aware of the obligations of the corporation they were

purchasing. It is a basic principle of corporate law that "[i]n case of merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues in existence, the latter corporation is liable for the debts, contracts and torts of the former." 15 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 7121 (perm ed. rev. vol. 1990). Stauffer Chemical Company had promised the plaintiffs jobs at the organic plant, and when the R-P defendants bought Stauffer Chemical Company, they assumed that obligation. Prior to the purchase of Stauffer Chemical Company, the R-P defendants could have contracted with ICIA to reserve jobs at the organic plant or they could have contracted with Local 912 to surrender the plaintiffs' rights to transfer. However, they did neither. Moreover, in 1988 R-P Basic explicitly adopted the cross-bumping agreement by incorporating it into its own collective bargaining agreements for the furnace plant. The fact that ICIA has refused to accept the laid-off furnace plant employees does not relieve R-P Basic of its own independent promise to them.

> Pacta sunt servanda -- contracts are to be kept. See generally Restatement (Second) of Contracts, Introductory Note to ch. 11; John D. Calamari & Joseph M. Perillo, Contracts 536 (3d ed. 1987) (Even though an equity court will not grant specific performance when a promise is impossible to perform, the breaching party is still liable in damages.).

Rhone-Poulenc signed the contract with full knowledge of the problems involved. It is in no position to argue frustration. Restatement, Second, Contracts, § 2661.[12] Moreover, it assumed liability for Stauffer

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[12] Restatement, Contracts, Second, § 2661 provides:

> (1) Where, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.
>
> (2) Where, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises, unless the language or circumstances indicate the contrary.

Chemical Company who is clearly bound by the contract. Rhone-Poulenc has not met its burden of proof but the most it could do, is create a jury issue. The record does not support a judgment of dismissal as a matter of law under Rule 50. Tuck v. HCA, 7 F.3d 465 (6th Cir. 1993).

III(b). **EFFECT OF MEMORANDUM AGREEMENT OF OCTOBER 13, 1988, ON LIABILITY OF RHONE-POULENC.**

The District Court, in the memorandum decision on the summary judgment motions, held the memorandum agreement of October 13, 1988, to be ambiguous and not appropriate for summary judgment. (R. 171 at 16, 17.) The District Court discussed the Memorandum Agreement of October 13, 1988, in ruling on the Rule 50 motion for judgment as a matter of law. However, the Court based its holding on the impossibility argument. (Bench ruling, TR. at pp. 725-749).

The District Court stated in its

memorandum decision on the summary judgment motions that in reference to the October 13, 1988, agreement "[a] logical reading is that employees who are covered by the cross-bumping agreement are to be laid off in accordance with that agreement (in other words, transferred to the organic plant, and that other employees are to be laid off by seniority)". (R. 171, memorandum of the Court at pp. 16, 17.) No other construction makes sense.

Rhone-Poulenc's argument on this issue is based on the assumption that the "or" in the October 13, 1988, agreement cannot possibly mean "and". However, it is well-established that where consistent with intent "or" is frequently construed as "and". Noell v. American Design, Inc., 764 F.2d 827, 833 (11th Cir. 1985); Williston on Contracts, Third Edition, Section 619, p. 738.

If there is any validity to Rhone-Poulenc's construction of the October 13, 1988, agreement, the document is clearly ambiguous. Thus, Rhone-Poulenc's construction only creates a jury issue. (See n. 10, R. 171 at 17.) There must be a complete absence of evidence to support Plaintiffs before a Rule 50 judgment as a matter of law would be appropriate. Tuck v. HCA, supra.

III(c). **EFFECT OF WAIVER UNDER MEMORANDUM AGREEMENT OF APRIL 19, 1991, ON LIABILITY OF RHONE-POULENC.**

Not only were the transfer rights under the memorandum agreement of September 13, 1982, not specifically mentioned in the agreement or waiver as being released, the provisions recognized the intention of the parties that the Plaintiffs could pursue their transfer rights. Certain of the employees receiving severance pay, who had no transfer rights under the Memorandum Agreement of September 13, 1982, had equal or greater

seniority to some of the Plaintiffs. All of the terminated employees received severance pay computed in the same manner. (Ex. P-1 - Paley Affidavit.)

Moreover, at the time of the severance payment, Rhone-Poulenc was refusing to honor Plaintiffs' contractual transfer rights. Rhone-Poulenc stated Plaintiffs had no enforceable transfer rights against them (Ex. P-1 - Paley Affidavit; Ex. P-4). Such misleading statements, even if made in good faith, would be sufficient to invalidate the waiver as to these particular claims. Ott v. Midland-Ross Corp., 600 F.2d at 30, 31 (6th Cir. 1979).

To require Plaintiffs as a condition of receiving the same severance pay given all other employees to also surrender contract rights which Rhone-Poulenc was refusing to honor in any event, is unconscionable and amounts to overreaching.

Such a waiver or release is void as a matter of law. T.C.A. 47-2-302. Since no additional amount was paid over severance pay given to other employees, there is also a want of consideration. T.C.A. 47-50-104. See also Street v. J.C. Bradford & Co., 886 F.2d 1472, 1481 (6th Cir. 1989); Ott v. Midland-Ross Corp., supra.

In any event, the ambiguity of the agreement, especially after the transfer clause was added at Plaintiffs' insistence, creates jury issues of intent. Accordingly, summary judgment for Rhone-Poulenc on this issue was inappropriate. Davidson & Jones Development Company v. Elmore Development Co., Inc., supra.

IV. LIABILITY OF INTERNATIONAL UNION AND LOCAL 912.

(a) Breach of Duty of Fair Representation.

Under a hybrid § 301/duty of fair representation claim, the employee must prove

that the Union breached its duty of fair representation and that the employer breached the Collective Bargaining Agreement before the employee may recover from either of them. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563, 96 S.Ct. 10408, 1055, 47 L.Ed.2d 231, 241 (1976); Bagsby v. Lewis Bros., 820 F.2d 799, 801 (6th Cir. 1987). (R. 171, memorandum of the Court at 18.)

In the Bench ruling, the District Court did not reach the duty of fair representation claim under the hybrid § 301 action since he ruled that the employer, Rhone-Poulenc, was excused because of impossibility. (TR. at pp. 725-749.) However, in the earlier memorandum decision, the District Court described the actions of Local 912 as "a complete sellout of an entire bargaining unit". (R. 171 at 33, 34.)

The District Court in the memorandum decision (R. 171) held the

International Union was separate from Local 912. However, the International Union was a full participant. It knew of and authorized all the actions of the Local Union. Indeed, the Union Constitution required the Local Union to keep the International Union fully informed.[13] Certainly, independent action by the Local Union, without notification of the International Union, was not permissible under the Constitution.

The International Union's method of operation is to set up financially irresponsible Local Unions (Ex. P-56, Ex. P-57). The Local Unions have no significant assets and take out no insurance policies to cover their liabilities. The International Union fully controls all actions of the Local

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[13]After receiving full notification concerning the plant closing and conflict of interest ramifications, the International Union, for the first time, failed to send a representative to the 1991 Collective Bargaining Agreements and also did not appear in the declaratory judgment action. It is unbelievable that the Local Union was not fully instructed by the International Union on filing the declaratory judgment action and the method of proceeding in the 1991 negotiations.

Unions. After the Local Unions, at the direction of the International Union, violates the rights of the member, the International then disavows all responsibility.

The extent of such control is shown by the Findings of Fact in the Allen case (Ex. P-58). In that case, the International even offered the employer to substitute another Local. The International Union, under the Constitution, has absolute authority to issue and revoke charters of Local Unions. In this case, the International Union had the knowledge, authority and responsibility to remedy all of the Plaintiffs' complaints.

This Court in Allen v. Allied Plant of Nashville, 881 F.2d 291 (6th Cir. 1989), held this same International Union liable for its participation. The International Union made the same legal arguments in the Allen case that it is making in this case.

Shimman v. Frank, 625 F.2d 80 (6th

Cir. 1980), relied upon by the International Union, does not support its position. In that case, a Local Union official assaulted a member. The International Union had no control or participation in the event. The Sixth Circuit emphasized in Shimman that the decision would be different if there was some proof of "participation or ratification" by the International Union. 625 F.2d at 998. Indeed, the Sixth Circuit subsequently in Allen v. Allied Plant of Nashville, supra, found some participation by the International Union in the grievance procedure sufficient for liability.

Moreover, the International Union has an independent duty of fair representation. It knew and approved of the conflict of interest situation which arose as soon as the Cross-Bumping Agreement was executed in 1982. Faced with this conflict, the Union had continually advised members of

the separate bargaining unit that one bargaining unit could not affect the rights of the other bargaining unit in relation to the Cross-Bumping Agreement. The International Union should have withdrawn from representing one or other of the bargaining units as soon as the conflict arose. Instead, it continued to collect dues from all members of both units.

Such actions by the International Union violated its independent duty of fair representation to Plaintiffs. Brotherhood of Locomotive for Firemen v. Mitchell, 190 F.2d 308 (5th Cir. 1951). Moreover, this duty of fair representation by the International Union is expressly recognized by Article VI(5) of the Constitution. The International was fully apprised of the Local Union's intention to discontinue the grievance on the ground that if the grievance were granted, it would damage the ICI bargaining unit.

The standard of care that a Union must exercise under its duty of fair representation is to serve the interest of all members without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. Vaca v. Sipes, 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842, 850.

A wide range of reasonableness is allowed a Union when it is serving the members within a particular unit but this standard is not applicable where the Union is acting in favor of one unit to the complete exclusion of another unit that had no participation in the negotiating process. Humphrey v. Moore, 375 U.S. 335, 349, 84 S.Ct. 363, 372, 11 L.Ed.2d 370, 382 (1964); Airline Pilots Assoc. v. O'Neill, 499 U.S. _____, 111 S.Ct. 1127, 1134, 113 L.Ed.2d 51, 63 (1991); Ford Motor Company v. Huffman, 345 U.S. 330, 337, 73 S.Ct. 681,

686, 97 L.Ed. 1048, 1057 (1953); R. 171, memorandum of the Court, pp. 33-35.

Finally, exactly what the Union, both the International and Local 912, did here should be examined. It had a conflict of interest and for its own interest, it favored less senior employees. This violated the very cornerstone of the Union movement, which is seniority.[14] (Ex. P-18 at 146, 147, 202.) Indeed, in the Humphrey v. Moore, 375 U.S. 335, 84 S. Ct. 363, 11 L.Ed.2d 370 (1964), the Supreme Court approved the Union's decision when it favored the most senior employees. The Court emphasized that this was the accepted and standard procedure. Here, the Union's acts were hostile and discriminatory. The Union, acting to protect itself from a conflict of interest situation, favored the least senior employees. Brotherhood of

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[14] Mr. Kincade acknowledged this. (Ex. P-8 at 146, 147, 202).

Locomotive for Firemen v. Mitchell, 190 F.2d 308 (Fifth Cir. 1951); see also, Allen v. Allied Plant of Nashville, supra.

(b) Breach of the Union Constitution.

The Union Constitution is a contract that can be enforced by Plaintiffs. Wooddell v. International Bd. of Elec. Workers, 502 U.S. _____, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991). A § 301 cause of action arises against a Union if it denies members the right to vote on a proposed contract in violation of the Union Constitution. Ackley v. Western Conference of Teamsters, 958 F.2d 1463, 1477 (9th Cir. 1992); R. 171, memorandum of the Court, 27.

This suit under the Union Constitution is different from a hybrid § 301 claim. Instead, it is a straightforward breach of contract suit and the plaintiff need only establish that the Union violated a

contractual provision of the Constitution. United Steel Workers of America v. Rawson, 110 S.Ct. 1904, 1912 (1990); IBEW, AFL-CIO v. Hechler, 481 U.S. 851, 863-865, 107 S.Ct. 2161, 2169, 2170 (1987); DelCostello v. Teamsters, 462 U.S. 151, 162, 165, 103 S.Ct. 2281, 2289, 2291, 76 L.Ed.2d 476 (1983); Autoworkers v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966).

The Union knew from June of 1990 that if it permitted ICI and the ICI bargaining unit to negotiate the June, 1991, contract without the participation of Plaintiffs, that Plaintiffs' rights would be seriously damaged. It falsely represented to Plaintiffs continuously up until the approval of the June, 1991, ICI contract that the ICI bargaining unit could not affect Plaintiffs' rights under the Cross-Bumping Agreement. Immediately after the execution of the new

contract, the Union took the position that Plaintiffs' rights were terminated. The Union violated its express obligations to Plaintiffs under Articles VI(2)(3) and (5) and XXIV(11)(e). At the very least, jury issues concerning the contractual breaches were created. Accordingly, judgment as a matter of law under Rule 50 was inappropriate. Tuck v. HCA, supra.[15]

V. RHONE-POULENC'S INTERNAL MEMORANDUM OF 9/13/88 SHOULD HAVE BEEN ADMITTED IN EVIDENCE.

The parties stipulated to the authenticity of Rhone-Poulenc's internal memorandum by Mr. Suydam of 9/13/88. It was offered as Trial Exhibit P-10 (same as Ex. P-4 on motions) and it is relevant on its face.

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[15]The District Court in the Bench ruling also indicated that Plaintiffs agreed there was no violation of Article VI(3). It was Plaintiffs' position that International Supervision (Trusteeship) was not required but that the General President had a broad range of powers which could have been exercised. The failure to do so was a violation of Article VI(3). (See argument of Plaintiffs' counsel to Court, TR. 484, 485, 499-519, 539-552, 659-665, 687-702, 710, 712, 715-718.)

The document was offered twice at relevant times although the witness had no personal knowledge of the memorandum. (TR. 340, 341, 628-634.) The Court ruled that a witness with personal knowledge of the exhibit must testify to the exhibit. (TR. 634.) It was offered the second time after extensive cross-examination of the witness concerning positions of the author of the memorandum. (TR. 577-594, 597-608.)

Once authenticity is established, an exhibit is admissible if relevant and not subject to a specific objection under the Federal Rules of Evidence. It is admissible without the necessity of a witness with specific personal knowledge to further identify the document. Rules 402 and 901 of the Federal Rules of Evidence; McCormick on Evidence (3rd ed. 1984) § 227, p. 698); 7 Wigmore, Evidence §§ 2128(3), 2130-2132.

(After authentication, "counsel" may read or submit document to jury.)

CONCLUSION

Plaintiffs were promised a one time transfer to the organic plant if they were laid off from the furnace plant. Defendants failed to keep their promise. No plaintiff or any bargaining unit representing plaintiffs ever agreed to the termination of their one time transfer right. For the foregoing reasons, plaintiffs respectfully request that the judgment below be reversed and this matter be remanded for a new trial on all issues.

Respectfully submitted,

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BY: /s Frank Steiner

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have been mailed to Cary Schwimmer, Esq., Young & Perl, P.C., 2380 One Commerce Square, Memphis, Tennessee 38103, William N. Ozier, Esq., Bass, Berry & Sims, 2700 First American Center, Nashville, Tennessee 37238, C. Dewey Branstetter, Jr., Esq., Branstetter, Kilgore, Stranch & Jennings, 200 Church Street, Nashville, Tennessee 37201 and to George E. Barrett, Esq., Barrett, Johnston & Parsley, 217 Second Avenue North, Nashville, Tennessee 37201-1601, this 7th day of April, 1994.

/s Frank Steiner
Frank Steiner

OMISSIONS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALBERT AKINS, et al.,	)	
	)	
Plaintiffs - Appellants,	)	
	)	
TONY BROCK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	NO. 94-5132
	)	
ZENECA, INC.,; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912 INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,	)	
	)	
Defendants - Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE -
COLUMBIA DIVISION

APPELLANTS' REPLY BRIEF

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OMISSIONS

REPLY ARGUMENT

Defendants' arguments at best establish factual disputes requiring a trial. Defendants create factual disputes by misstating the record, directly and indirectly contradicting plaintiffs' statement of facts and drawing illogical conclusions from admitted facts. At the same time, defendants argue there are no controverted facts.

Based on the evidentiary record, the facts are as stated in plaintiffs' brief.[1] Plaintiffs' further specifically respond to defendants' briefs as follows:

I. DEFENDANTS CONSPIRED TO DESTROY PLAINTIFFS' ONE TIME TRANSFER RIGHTS UNDER THE CROSS-BUMPING AGREEMENT IN VIOLATION OF TRUST AND CONTRACTUAL

[1] If defendants would agree the facts are as stated in plaintiffs' brief, there would be no factual controversy. Rhone-Poulenc, the Local Union and ICI have designated various of their briefs for inclusion in the appendix. Reliance on such non-evidentiary documents illustrates the lack of evidentiary support in the record for defendants' assertions.

OBLIGATIONS.

The declaratory judgment action filed by Local Union 912 was a sham. (Exs. P-34, P-35, P-36.) It claimed jurisdiction under § 301 of the LMRA, 29 U.S.C. § 185. Yet, the Local Union had made no effort to utilize the grievance procedures under the Collective Bargaining Agreement to resolve the issue. Accordingly, based on this issue alone, all the defendants had to do was file a motion to dismiss. Vaca v. Sipes, 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842, 850 (1967).

Further, the complaint in the declaratory judgment action asked the Court to declare the "validity" of the Cross-Bumping Agreement. There is no jurisdiction under § 301 to declare the validity of a Collective Bargaining Agreement. Accordingly, on this issue also, all the defendants had to do was file a motion to dismiss. Huessner v.

National Gypsum Co., 887 F.2d 672, 676 (6th Cir. 1989); see also Adcox v. Teledyne, Inc., No. 93-3078, 1994 U.S. App. LEXIS 7811 (6th Cir. April 19, 1994 - copy attached to ICI brief).

Moreover, the declaratory judgment action only sought a simple legal interpretation of the Cross-Bumping Agreement. None of the parties to the declaratory judgment action filed a motion to dismiss or for summary judgment. Instead, they simply waited eight months until ICI, with the Local Union, could remove the Cross-Bumping Agreement from the Collective Bargaining Agreement for the organic plant.[2] The layoffs, which had been scheduled for February of 1991, were delayed by Rhone-Poulenc until

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[2] ICI erroneously states as a matter of fact that the declaratory judgment action was "vigorously litigated". (ICI brief, p. 14.) In this case, which is much more complicated, the complaint was filed on November 14, 1991 (R. 1), and ICI's motion to dismiss was filed on January 9, 1992 (R. 20), a period of less than two months.

immediately after Local Union 912 and ICI executed the new contract in June of 1991. Throughout this delay period, Local Union 912 continually represented to plaintiffs, with full knowledge that such representations were false, that the actions of the ICI bargaining unit could not affect plaintiffs' rights. (Exs. P-1, P-7, P-14, P-17 at 37, 107-109, 121-124, 114-116, 160, 161, 167, P-40, P-41; TR. 346, 347, 350, 351, 443, 444, 570-573.)

Rhone-Poulenc argues that the delay in the layoffs was due to delays in production at the new Louisiana plant. However, the Louisiana plant began production and shipment in February of 1991 as expected. By law, Rhone-Poulenc was required to give 60 days notice of the layoff. At the time this notice was scheduled to be given, Rhone-Poulenc could not possibly have known that it would subsequently have production delays in the new Louisiana plant. Moreover, on June 20, 1990,

Rhone-Poulenc announced some of the production would be shifted to the Montana plant but made no reference to the Louisiana plant. (Ex. P-13, P-32; cf. Rhone-Poulenc's Appendix D to motion for summary judgment - Hunsucker aff. - R. 43.)

Rhone-Poulenc's decision to postpone the layoffs had to be made between November 19, 1990 (Exs. P-5, P-33), and December 6, 1990, the date of its answer (Ex. P-37). The only reason for the postponement that makes sense and is consistent with the contemporary documents is that Rhone-Poulenc delayed the layoffs to permit ICI and the Union to remove the 1982 Cross-Bumping Agreement from the ICI contract.[3]

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[3]The Trial Court, in the memorandum decision on the summary judgment motions, did not accept the reasons suggested by Rhone-Poulenc for the delay. The Trial Court did specifically find that only after the commencement of the declaratory judgment action, did Rhone-Poulenc indicate the layoffs might be delayed. (R. 171 at p. 9.)

The International Union argues that it is not part of the conspiracy, claiming its only connection is the letters of June 26, 1990, and July 10, 1991. This ignores that the Local Union continually sought the advice of "IUOE's legal department" as recognized by Mr. Kincade's letter of July 16, 1991. (Ex. P-10; cf. P-18 at 134-137.) Moreover, the International Union had participated in negotiating all Collective Bargaining Agreements for both plants from 1982 up until 1991. (Exs. P-52-55, P-19 at 92-99, 102, P-18 at 96-101, 116, 117, 176-183, P-26, P-27, P-28; R. 54 - Ex. 1 to Appendix A, p. 23.) The facts involved here compel the conclusion that the declaratory judgment action was filed with the knowledge, consent and participation of the International Union.[4]

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[4]The International Union has not submitted an affidavit or other document indicating it had no prior knowledge of the declaratory judgment action.

Tennessee uniformly recognizes the tort of conspiracy. Nashville Memorial Hospital, Inc. v. Binkley, 534 S.W.2d 318, 321 (Tenn. 1976 - "everyone has the right to establish and conduct a lawful business or engage in a lawful profession, and is entitled to the protection of organized society, through its courts, whenever that right is unlawfully invaded"); Kirsey v. Overton Pub. Inc., 739 S.W.2d 230 (Tenn. App. 1987); Hayes v. Schweikart's Upholstering Co., 402 S.W.2d 472 (Tenn. App. 1966 - not necessary to prove particular agreement but sufficient if fair preponderance of evidence shows a working in harmony to promote a common purpose and corporate officer must be loyal to his trust and avoid conflicts in interest); Franklin v. Green, 342 S.W.2d 233, 236 (Tenn. App. 1960 - conspiracy even though defendants made it appear they participated separately and independently of each other).

This Court has also recognized the tort of conspiracy under Tennessee law. Carruthers Ready-Mix, Inc. v. Cement Masons Local Union, 779 F.2d 320 (6th Cir. 1985); Continental Motel Brokers, Inc. v Blankenship, 739 F.2d 226 (6th Cir. 1984); Edwards v. Travelers Ins. of Hartford, Conn., 563 F.2d 105, 119 (6th Cir. 1977). In Carruthers, supra, 779 F.2d at 324, the Court stated:

> [E]very man has the right of property in his own labor, and the right to work without interference; and whoever intentionally interferes with this right is liable in tort for the damage caused...

Federal law also recognizes conspiracy and tortious interference with contract. Allen v. Allied Plant of Nashville, 881 F.2d 291 (6th Cir. 1989[5]); Wilkes-Barre Pub. v. Newspaper Guild, 647 F.2d 372 (3rd Cir. 1981), cert. den. 182 S.Ct. 1003. Accordingly, under either federal or state

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[5]ICI incorrectly cites the Allen case for the opposite of its actual holding. (ICI brief, p. 22.)

law, plaintiffs have established a valid claim of conspiracy and tortious interference.

II. ICI IS LIABLE TO PLAINTIFFS BECAUSE:

(1) PLAINTIFFS' ONE TIME TRANSFER RIGHTS TO THE ORGANIC PLANT UNDER THE CROSS-BUMPING AGREEMENT WERE VESTED AND FULLY BINDING ON ICI;

(2) NO PLAINTIFF OR ANY BARGAINING UNIT REPRESENTING PLAINTIFFS EVER AGREED WITH ICI TO CANCEL THE CROSS-BUMPING AGREEMENT; AND

(3) ICI SECURED THE DELETION OF THE CROSS-BUMPING AGREEMENT FROM ITS 1991 COLLECTIVE BARGAINING AGREEMENT BY INDUCING THE LOCAL UNION TO BREACH ITS CONTRACTUAL AND TRUST OBLIGATIONS TO PLAINTIFFS AND ACCORDINGLY, SUCH DELETION IS VOID.

In Hehemann v. E.W. Scripps Co., 661 F.2d 1115, reh. den. 668 F.2d 878 (6th Cir. 1981), cert. den. 456 U.S. 991, 73 L.Ed.2d 1286, 102 S.Ct. 2272, this Court enforced a lifetime employment agreement as compared to the much more limited one time transfer rights agreed to in this case. The lifetime employment agreement was a side agreement which was also listed in the primary Collective Bargaining Agreement just as the Cross-Bumping Agreement was listed in this action. The primary Collective Bargaining Agreement expired but the Court held that the side agreement concerning lifetime employment was separately enforceable.

ICI Argues that Hehemann is not applicable for three reasons. First, it claims it was not a signatory to the Cross-Bumping Agreement. Second, it claims that the parties in Hehemann had not negotiated a superseding Collective Bargaining Agreement

such as ICI and the Local Union did in the present case. Third, it claims that the contract is more specifically stated in Hehemann than here, especially in regard to permanency. (ICI brief, p. 32.)

In reply to ICI's first argument, the original Cross-Bumping Agreement was signed separately on behalf of both plants. The original Cross-Bumping Agreement was also separately executed by the negotiating committees for both bargaining units. ICI owned and operated both plants under the 1985 Collective Bargaining Agreements executed by Stauffer Chemical Company.

ICI later sold the furnace plant to Rhone-Poulenc. ICI concedes that Rhone-Poulenc is the successor to Stauffer Chemical Company but continues to insist that it is not a successor. Moreover, in 1988, ICI signed a contract expressly agreeing to be bound by the 1982 Cross-Bumping Agreement.

There is no legal authority even hinting that a contracting party may urge as a defense to the contract, "I only agreed to a certain provision because the other party would not contract with me otherwise." Even Rhone-Poulenc recognized in the Suydam Memorandum of September 13, 1988, that ICI was bound by its 1988 agreement in spite of ICI's statement that it would not honor its agreement (Ex. P-4).

As a matter of law, ICI was a successor to Stauffer Chemical Company. Howard Johnson Co. v. Detroit Joint Bd., Hotel & Restaurant Employees, 417 U.S. 249, 263, 94 S.Ct. 2236, 2244, 41 L.Ed.2d 46, 57 (1974); General Teamsters v. Bill's Trucking, Inc., 493 F.2d 956 (3rd Cir. 1974). But in any event, it was also a signatory to the 1988 Collective Bargaining Agreement whereby it

expressly agreed to be bound by the Cross-Bumping Agreement.[6]

As to ICI's second argument, it makes no significant difference whether a Collective Bargaining Agreement expires or is superseded. The validity of the expired or superseded agreement cannot be litigated under Section 301. Huessner v. National Gypsum Co., supra.[7]

As to ICI's third argument, the Cross-Bumping Agreement is complete on its face. The lifetime employment agreements in Hehemann were dependent upon the underlying collective bargaining contract for its most significant terms and conditions, including pay.

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[6]Actually, ICI should have resolved the cross-bumping issue when it owned and operated both plants. But instead, it adopted the tactic of assuming and signing the contract but stating it would not honor the agreement.

[7]The Cross-Bumping Agreement here is an existing contract with ICI. It is neither superseded nor expired.

Here, plaintiffs fully performed their part of the bargain. ICI's obligations are just as permanent as any other contract where there has been full performance. ICI received the fruits of that bargain in that the two plants still have separate Collective Bargaining Agreements. But in any event, Stauffer Chemical Company received full performance by plaintiffs in 1982.[8]

Under such circumstances, plaintiffs' one time transfer rights are vested and ICI must contract with the individual plaintiffs for the release of those rights. Moreover, even if it should be concluded that the applicable bargaining unit could modify those rights, there is no contract with any bargaining unit representing plaintiffs concerning these rights.

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[8]Rhone-Poulenc has agreed that it is responsible for any liability of Stauffer Chemical Company. (TR. 248, 249.)

The Cross-Bumping Agreement involved here is an existing contract. Under corporate law, a "merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues in existence, the latter corporation is liable for the debts, contracts and torts of the former". Stauffer Chemical Company had promised the plaintiffs jobs at the organic plant, and when ICI bought Stauffer Chemical Company, it assumed that obligation. 15 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 7121 (perm ed. rev. vol. 1990).

ICI basically argues that basic contract principles should be ignored. In this case, we have fundamental issues of offer and acceptance which have been basic to the development of a civilized society. In Hehemann, in rejecting a similar argument to

the argument by ICI here, the Court, 661 F.2d at 1121, stated:

> Although this Court has recognized that not all principles of general contract law are applicable in the interpretation and construction of collective bargaining agreements, *Kellogg Co. v. N.L.R.B.*, 457 F.2d 519, 524 (6th Cir.), *cert. denied.*, 409 U.S. 850, 93 S.Ct. 58, 34 L.Ed.2d 92 (1972), it is usually held that general contract principles of offer and acceptance are applicable in determining whether an enforceable labor agreement exists at all. *United Steelworkers v. Bell Foundry Co.*, 626 F.2d 139, 140 (9th Cir. 1980); *F. W. Means & Co. v. N.L.R.B.*, 377 F.2d 683, 686 (7th Cir. 1967). *See Kentucky Skilled Craft Guild v. General Electric Co.*, 431 F.2d 62, 66-67 (6th Cir. 1970).[9]

Finally, even if it should be held that plaintiffs' rights were not vested nor still existent, ICI should not be permitted to

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[9] An examination of the cited cases reveals that it is extremely rare, if ever, that the Courts actually fail to follow basic contract principles.

retain the benefits it received from inducing Local Union 912 to breach its contractual and trust obligations to plaintiffs. ICI fully exploited the conflict of interest situation to its own advantage. All parties are held to the duty of good faith and fair dealing. Hooks v. Gibson, 842 S.W.2d 625, 628 (Tenn. App. 1992); Williams v. Maremont Corp., 776 S.W.2d 78, 81 (Tenn. App. 1988).

ICI's primary defense to this action is the agreement it made with Local Union 912 and the ICI bargaining unit to delete the Cross-Bumping Agreement from the ICI contract. ICI secured this deletion by inducing Local Union 912 to breach contractual and trust obligations to plaintiffs. ICI is estopped to rely upon such deletion and as a matter of law, the deletion is void. Restatement, Second, Contracts, Sections 193, 194. See also, Brotherhood of Locomotive Firemen, etc. v. Mitchell, 190 F.2d 308, 312,

313 (5th Cir. 1951 - if bargaining agent discriminates against nonmembers, employer is not "entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making"). Summary judgment for ICI was not appropriate on the record involved here.

III. THE DOCTRINE OF IMPOSSIBILITY OR IMPRACTICABILITY DOES NOT EXCUSE RHONE-POULENC'S FAILURE TO HONOR ITS EXPRESS AGREEMENT TO GIVE PLAINTIFFS A ONE TIME TRANSFER RIGHT TO THE ORGANIC PLANT SINCE RHONE-POULENC HAD FULL KNOWLEDGE OF THE PROBLEMS INVOLVED.

When Rhone-Poulenc purchased the furnace plant from ICI, it knew the Cross-Bumping Agreement was an express obligation of the furnace plant. Further, it signed the 1988 and 1991 contracts expressly incorporating the Cross-Bumping Agreement which is still in effect in Rhone-Poulenc's

contract. Moreover, it recognized in the memorandum of September 13, 1988, that the Cross-Bumping Agreement was an asset to the employees and further recognized its potential liability if it could not force ICI to comply with the agreement. (Ex. P-4; see also R. 171 at p. 15 - memorandum opinion.)

On page 13 of its brief, Rhone-Poulenc's claims that "[t]he plaintiffs who were laid off made request to ICI that they be permitted to transfer to the organic plant. (TR. 355; Stip ¶ 82.)" What plaintiffs in fact did, was notify Rhone-Poulenc of their intention to exercise their transfer rights under the Cross-Bumping Agreement[10].

The notice of intent forms (Ex. P-43 - R. 160; R. 136, pp. 633, 634; TR. 397-

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[10]Rhone-Poulenc, on pages 12 and 13 of its brief, also claims that the grievance was that plaintiffs "be permitted to transfer to the ICI plant". In fact, the grievance, just like the notice of intent, was directed to Rhone-Poulenc for breach of its obligations under the Cross-Bumping Agreement. A separate grievance was directed to ICI.

400) were given to Rhone-Poulenc and provided as follows:

> The Memorandum of Agreement, dated 09/11/82, between the Company and the Union, states in part:
>
> (Paragraphs 2, 3, 4 and 5 of the Cross-Bumping Agreement are set out verbatim - omitted here.)
>
> I have read the provisions outlined above and elect to do the following:
>
> Check one: ___ I waive my rights to move to the Organic Plant
>
> ___ I hereby exercise my rights to move to the Organic Plant
>
> _____
> Signed Date

The sole basis of the Trial Court's holding on the Rule 50 motion excusing Rhone-Poulenc from its express agreement, was that performance was impossible. The authorities relied upon by defendant involve supervening, unforeseeable events after the making of the

contract. Restatement, Second, Contracts § 261. (Illustrations 1 and 6 to § 261 cited by Rhone-Poulenc, involve unforeseeable events subsequent to the making of the contract.) Florida Power & Light v. Westinghouse Elec. Corp, 826 F.2d 239 (4th Cir. 1987 - unforeseeable subsequent action by third party); Opera Co. of Boston v. Wolf Trap Foundation, 817 F.2d 1094 (4th Cir. 1987 - remanded for factual determination of whether reasonable likelihood contractor should have guarded against the risk).

A different rule is applicable where the condition causing the impossibility is in existence at the time of the making of the contract. In that situation, an essential condition for invoking the impossibility or impracticability doctrine is that the promisor be without fault and the impracticability must arise "because of a fact of which he has no reason to know and the nonexistence of which

is a basic assumption on which the contract is made". Restatement, Second, Contracts § 266. The fact that ICI owned the organic plant was known to Rhone-Poulenc when it purchased the furnace plant and also when it subsequently agreed to the 1988 and 1991 contracts. (R. 171 at 16 - memorandum opinion.)

Moreover, Rhone-Poulenc has the burden of proof on its impossibility defense. McCalden v. California Library Ass'n, 919 F.2d 538, 543 (9th Cir. 1990) (955 F.2d 1214, 1219). At the very least, a jury issue is created and dismissal under Rule 50 is inappropriate.[11]

IV. THE MEMORANDUM AGREEMENT OF OCTOBER 13, 1988, MADE NO CHANGES IN THE CROSS-BUMPING AGREEMENT BUT TO THE EXTENT IT COULD BE CONSTRUED AS

[11] Rhone-Poulenc states in its brief that the order dismissing Stauffer Chemical Company was not appealed. However, Rhone-Poulenc fails to note that the order was not appealed because Rhone-Poulenc expressly agreed on the record to assume the liabilities of Stauffer Chemical Company. Stauffer Chemical Company is clearly liable under the Cross-Bumping Agreement. (TR. 248, 249.)

"CHANGING" OR "CLARIFYING" THE CROSS-BUMPING AGREEMENT, IT IS AMBIGUOUS, REQUIRING A JURY TRIAL.

Rhone-Poulenc claims (p. 11 of its brief) that the October 13, 1988, memorandum "clarified" Rhone-Poulenc's obligations under the Cross-Bumping Agreement. However, the alleged "clarification" claimed by Rhone-Poulenc was expressly rejected in writing by plaintiffs. (TR. 562-568; Exs. P-1, P-2, P-3, P-29, P-14.)

Basically, what Rhone-Poulenc did in the 1988 negotiations was to resort to trickery. It recognized that ICI's tactic of signing the 1988 Collective Bargaining Agreement for the organic plant, including the Cross-Bumping Agreement but denying ICI was bound by it, was a useless procedure. So instead, Rhone-Poulenc informed the plaintiffs that you are only affirming the Cross-Bumping Agreement so we can later explain to our

employees if they are displaced by ICI employees that you refused to change the Cross-Bumping Agreement. After plaintiffs agreed to such affirmance, Rhone-Poulenc argues you did more than affirm, you "clarified" our obligations and in fact this "clarification" is sufficient to mean Rhone-Poulenc has no further liability to plaintiffs. (TR. 562-568; Exs. P-1, P-2, P-3, P-29, P-14.)

The October 13, 1988, agreement should be limited to exactly what Rhone-Poulenc stated it was, a simple affirmance of the Cross-Bumping Agreement. The Trial Court, in its ruling on the summary judgment motions, held the October 13, 1988, memorandum was ambiguous (R. 171, p. 17) and noted plaintiffs had expressly rejected in writing the "clarification" sought by Rhone-Poulenc. (R. 171, p. 17, n. 10.) If any weight is given to

Rhone-Poulenc's claim of "clarification", it at best creates a jury issue.

If a contract is ambiguous, extrinsic evidence is admissible and a jury must decide the controverted positions. Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335, 1338 (6th Cir. 1975); Scott v. Anchor Motor Freight, Inc., 496 F.2d 276, 280 (6th Cir. 1974.) In Scott, this Court stated as follows, 496 F.2d at 280:

> When a contract is ambiguous, it is for the jury to determine the meaning of its terms, subject to proper instructions and based upon "evidence of the surrounding circumstances and the practical construction of the parties." Tennessee Consolidated Coal Co. v. United Mine Workers of America, 416 F.2d 1192, 1198 (6th Cir. 1969);[2] Goddard v. Foster, 17 Wall. 123, 142, 84 U.S. 123, 21 L.Ed. 589 (U.S. 1872); Local 783 v. General Electric Co., 471 F.2d 751, 757 (6th Cir. 1973).
>
> ...

> When a contract is unambiguous, the judge must state its proper construction to the jury rather than allow it to adopt an erroneous view of the contract. See 4 S. Williston, Law of Contracts, 303 (3rd ed. 1961). "Where, however, the meaning of a writing is uncertain or ambiguous, the question of its meaning should be left to the jury." 4 Williston, 652. Cf. 3 A. Corbin, Contracts 226-27 (1960).

V. **THE RELEASES SIGNED BY CERTAIN PLAINTIFFS CONTAINED A PROVISION EXCEPTING THE CLAIMS UNDER THE CROSS-BUMPING AGREEMENT. BUT IN ANY EVENT, THE EVIDENCE AT LEAST CREATED A FACTUAL ISSUE AS TO WHETHER THOSE CLAIMS WERE EXCEPTED.**

In its argument (Rhone-Poulenc's brief, pp. 29, 30.), Rhone-Poulenc quotes the provisions of the release out of context and omits the most significant portion. Rhone-Poulenc would lead the Court to believe that the only exceptions to the release were unemployment and worker's compensation claims.

Rhone-Poulenc left off its quote "and except as provided under the terms of the memorandum of understanding".

The memorandum of understanding contained the following provision:

> Qualifying for a position at the Organic Plant will make an individual ineligible under this memorandum whereas failure to qualify for a position at the Organic Plant will not make an individual ineligible.

The sworn statements of plaintiffs established that the above clause was inserted at their insistence for the purpose of protecting their transfer rights. (Exs. P-1, P-17 at 48-50, P-18 at 165-170, P-19 at 11-14, 28; TR. 626.) The above quoted provision is meaningless if plaintiffs had fully released their transfer rights.

The most logical construction of the release is that the one time transfer rights of plaintiffs under the Cross-Bumping Agreement was an express exception. If there

is any merit to Rhone-Poulenc's construction, it at best creates a factual issue as controverted by plaintiffs' sworn statements to be tried by the jury.[12]

VI. THE INTERNATIONAL UNION VIOLATED:

(a) ARTICLES VI(2), (3), (5) AND XXIV(11)(E) BY FAILING TO TAKE APPROPRIATE ACTION IN RESPONSE TO THE LETTER OF JUNE 26, 1990, TO INSURE THE ICI CONTRACT HAD TO BE SUBMITTED TO PLAINTIFFS FOR APPROVAL TO THE EXTENT THEIR

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[12]Although the issue is not involved in this appeal, Rhone-Poulenc also erroneously implies (Rhone-Poulenc brief, pp. 12, 13) that plaintiffs failed to exhaust the grievance procedures of the contract. Under the Collective Bargaining Agreement (R. 54 - Ex. 1 to Appendix A, pp. 20, 21), only the Union could carry the grievance past the second step. The record establishes that plaintiffs did all they could to invoke the grievance procedures of the contract. (Exs. P-1, P-48, P-60, P-62; TR. 362, 363, 392, 393, 396, 355, 427-432, 437; R. 162, ¶ 106.) Plaintiffs had taken all required actions to exhaust the grievance procedure under the Rhone-Poulenc Collective Bargaining Agreement. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976); Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

RIGHTS WERE AFFECTED;

(b) ARTICLES VI(3) AND (5) AND XXIV(11)(E) BY PERMITTING LOCAL 912 TO AGREE TO THE DELETION OF THE CROSS-BUMPING AGREEMENT FROM THE ICI CONTRACT;

(c) ARTICLES VI(3) AND (5) BY FAILING TO INSURE THAT LOCAL 912 FAIRLY PROCESSED THE GRIEVANCE AGAINST RHONE-POULENC; AND

(d) ITS DUTY OF FAIR REPRESENTATION TO PLAINTIFFS.

The Union, both International and Local, accepted plaintiffs' dues every month after September of 1982, knowing it had a conflict of interest. When the conflict ripened, it refused to honor its contractual obligations under the Union Constitution.

The International Union, obviously recognizing that the General President simply

did not provide the contractual services agreed to, erroneously argues that plaintiffs have somehow abandoned some of the contractual claims under the Union Constitution. The designated sections are interrelated [Articles VI(2), (3), (5) and XXIV(11)(e)] and the complete contract must be considered.

Moreover, the pertinent facts were set out in the pre-trial order governing the trial. (R. 202, pp. 1-5.) The specific constitutional sections were designated in the issues. Plaintiffs' theory in the pre-trial order expressly included the following charge that "the International Union breached its contractual obligations to plaintiffs under Section VI(2), (3) and (5) and XXIV(11)(e) of the IUOE Constitution".

The International Union argues that because plaintiffs stated in argument they were not claiming a trusteeship should have

been imposed (TR. 484)[13], that plaintiffs have waived all other actions the General President could have taken. However, the record clearly establishes that plaintiffs argued to the Court that the General President should have taken numerous other actions short of trusteeship and that he was fully authorized to do so. (TR. 539-542, 549-552, 712-718.)

Under the Union Constitution, the General President had wide and varied powers and he could have taken numerous remedial action up to, and including, the ultimate of trusteeship. (Ex. P-51, pp. 5, 6, 9-11, 22-24.) However, the International Union, with full knowledge, made no effort to take any remedial action.[14]

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[13]The Union Constitution, Article VI(3), uses the phrase "International Supervision" to mean "Trusteeship".

[14]The International Union's reply was non-responsive and nonsensical. It took the position that it could not act until the new ICI contract was approved because there were existing contracts. The very purpose of the inquiry was to determine if Plaintiffs had to participate in and approve the future ICI contract which could affect their rights. Immediately after the ICI contract was approved, the plaintiffs were advised by the

The International Union relies on cases decided before the Supreme Court's decision in Wooddell v. International Bd. of Elec. Workers, 502 U.S. _____, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991). The Wooddell case involved the enforcement of contract rights similar to the contract claims involved herein. Id. 112 S.Ct. at 499.

The International Union primarily relies upon Brenner v. Local 514 United Brotherhood of Carpenters, 927 F.2d 1283 (3rd Cir. 1991). However, Brenner involved claims primarily in the nature of tort. Brenner was decided on April 18, 1991, whereas Wooddell was argued on October 16, 1991, and decided on December 4, 1991, so the Brenner Court did not have the advantage of the Supreme Court's ruling in Wooddell at the time of its decision.

Union that they no longer had any rights.

In a case subsequent to Wooddell, the Ninth Circuit held in Ackley v. Western Conference of Teamsters, 958 F.2d 1463, 1477 (9th Cir. 1992), the members could sue the Union for breach of contract if the Union denied its members the right to vote on a contract. The International Union makes no mention of the Ackley case in its brief.

The International Union basically argues that the Courts are bound by the General President's interpretations of the Union Constitution regardless of how arbitrary such interpretations are. Arbitrary interpretations by an International Union are not binding on the Court. The Court may interfere where the "official's interpretation is not fair or reasonable". Millwright Local No. 1079 v. UBCJA, 878 F.2d 960, 962 (6th Cir. 1989).

Moreover, Millwright and Brenner as noted earlier, were pre-Wooddell decisions.

Under Wooddell, contract principles are applicable. This means that the contractual provisions are construed to be consistent and the provision that the General President shall be "strictly accountable" for the faithful performance of his duties, must have some meaning. Furthermore, if the contract is ambiguous, it is construed against the drafter. Hills Materials Co. v. Rice, 982 F.2d 514, 516 (Fed. Cir. 1992); Tate v. Trialco Scrap, Inc., 745 F.Supp. 458, 467 (M.D. Tenn. 1989), aff'd 908 F.2d 974 (6th Cir. 1990).

Certainly, the Union's interpretation of the contract are not binding on the Court. TCP Industries, Inc. v. Uniroyal, Inc., 661 F.2d 542, 549 (6th Cir. 1981); Local 783 v. General Electric Co., 471 F.2d 751, 756-758 (6th Cir. 1973), cert. den. 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55. See also, U.S. Fire Ins. Co. v. Pressed Steel

Tank Co., Inc., 852 F.2d 313, 316 (7th Cir. 1988). A contract does not become ambiguous just because parties do not agree on interpretation. Port of Portland v. Water Quality Ins. Syndicate, 796 F.2d 1188, 1194 (9th Cir. 1986). But if it is ambiguous, parole evidence on intent is admissible and a jury issue is created. Scott v. Anchor Motor Freight, Inc., supra.

The International Union also had a duty of fair representation to plaintiffs. Article VI(5) of the Constitution specifically provides that the General President "shall be strictly accountable and responsible for the faithful performance of his duties and shall administer and enforce every law, rule, regulation and requirement of the Constitution, Ritual and Obligation". Moreover, the International Union's participation and control of the Local Union in this case, are sufficient to establish an

independent duty of fair representation by the International Union. (Ex. P-58, p. 29; Ex. P-59.)[15]

VII. **THE LOCAL UNION ACTED WITH HOSTILITY AND D E L I B E R A T E DISCRIMINATION TOWARDS PLAIN-TIFFS AND NO PLAINTIFF NOR ANY BARGAINING UNIT REPRESENTING PLAINTIFFS EVER AUTHORIZED THE DELETION OF THE CROSS-BUMPING AGREEMENT FROM THE ICI CONTRACT.**

The Local Union argues that the negotiating committee for the 1991 ICI contract was authorized to surrender plaintiffs' rights. This is contradicted by the pleadings as admitted by the Local Union (R. 1 - complaint; R. 23 - answer of Local Union) and by the testimony of plaintiffs. (TR. 352, 569, 571, 572; cf. Ex. P-7.)

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[15]The Collective Bargaining Agreement in the Allen case (Ex. P-59), also as in this case, designated Local Union 912 as the exclusive bargaining agent.

Paragraph 17 of the complaint, as admitted by Local Union 912, stated as follows:

> No member of the bargaining unit from the phosphate plant ever agreed to or authorized the deletion of the September 13, 1982, agreement. The June, 1991 agreement between ICI Americas Inc. and Local Union 912 was never authorized or approved by, nor submitted to, the bargaining unit for the phosphate plant. (Admitted by Local Union 912 in its Answer.)

In Ackley v. Local Union 337, 948 F.2d 267 (6th Cir. 1991); see also 910 F.2d 1295, 1298 (6th Cir. 1990), the plaintiffs were members of the bargaining unit which ratified the compromise agreement negotiated by the Union. They were not members of the negotiating committee because they had not been members for at least two years prior to negotiations. Under the applicable bylaws, this was a valid condition applying to all new members, not just to those plaintiffs. In any

event, those plaintiffs were members of the bargaining unit which authorized the negotiating committee and the Local Union to negotiate the contract and were members of the bargaining unit that ratified the contract. 910 F.2d at 1298.[16]

The Local Union's claim of lack of hostility is also rebutted by the record. The Local Union argues that because they were pleasant and smiled at plaintiffs as they continually represented to plaintiffs that their rights would not be affected by the ICI negotiating unit, no hostility can be established.

Mr. Kincade's letter of June 26, 1990 (Ex. P-7), clearly recognized that plaintiffs' rights would be affected and also clearly recognized that plaintiffs' bargaining

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[16] Ratkosky v. United Transportation Union, 843 F.2d 869 (6th Cir. 1988), and Rakestraw v. United Airlines, Inc., 981 F.2d 1524, 1530 (7th Cir. 1992), are also inapposite. The complaining members were included in the applicable bargaining units established for the negotiating process.

unit could outvote the ICI bargaining unit.

Mr. Carroll testified (TR., pp. 369, 370) as follows:

> Q Mr. Carroll, if you had known ultimately, looking back, if you had known that the ICI employees deleting that from the contract, deleting the cross bumping portion from your contract would have affected your rights what would you have done?
>
> A The first thing that we would have done was wanted a committee, our committee in on those meetings, and to represent our behalf. And if they had ever tried to vote it out, they couldn't because we had 250 members. They had a hundred twenty-five. It just wouldn't have come out of there.
>
> Q The ICI contract of 1991, was that ever submitted to you or the employees at Rhone-Poulenc for approval?
>
> A No, ma'am.

Q Do you think it should have been?

A Yes, ma'am.

...

Q The fact that the ICI and Local 912 bumped or deleted the cross bumping agreement from their '91 contract, do you feel that affected your rights?

A Yes, I do.

Mr. Carroll further testified (TR., pp. 350, 351) as follows:

Q And what did Mr. Kincade continue to tell you?

A He kept telling us that they could not affect us. If they voted it out of their contract, they could not vote ours away.

Plaintiffs could have and would have outvoted the ICI bargaining unit if they had suspected their rights would be destroyed. The Local Union kept them from participating by falsely notifying them their rights would

not be affected. The Union's actions in this case constitute hostility on any standard but it is certainly hostility where a trustee engages in such activities.[17]

Moreover, the Local Union failed to inform plaintiffs of the settlement offer received from ICI. (Exs. P-1, P-14, P-19 at 72-78, P-6.) And finally, the Union, both International and Local, discontinued the grievance against Rhone-Poulenc because of its duty of fair representation "with its members at ICI". (TR. 458-467; Exs. P-10, P-44; see also R. 171 at 30, 31 - memorandum opinion.) Brotherhood of Locomotive Firemen, etc. V. Mitchell, 190 F.2d 308 (5th Cir. 1951 - bargaining agent for all employees favored

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[17]The Local Union, like the International Union, also erroneously argues that plaintiffs have abandoned a duty of fair representation claim. Plaintiffs have stated the facts and briefed the legal issues. There has been no abandonment of any claim. ICI also erroneously argues plaintiffs have abandoned certain inducing breach of contract claims against it. ICI just ignores the numerous statements by plaintiffs in their brief that ICI induced the Local Union to breach its contractual and trust obligations to plaintiffs.

members over nonmembers in conflict of interest situation).

VIII. **THE PROFFERED EXHIBIT (EX. P-4) CONTAINED RELEVANT STATEMENTS AND THE AUTHOR WAS IDENTIFIED AND ACCORDINGLY, BASED ON STIPULATED AUTHENTICITY, THE DOCUMENT SHOULD HAVE BEEN ADMITTED.**

The words "authentication" and "identification" describe the same process. At p. 41 of its brief, Rhone-Poulenc quotes from Professor Moore to the effect that "authentication or identification" is a two step process of showing the document contains a relevant statement and also identifying the author. Since authenticity was stipulated (R. 202 - second pre-trial order), it was agreed that this process had been completely met.

Moreover, the document, on its face, contains relevant statements and

identifies the author. Furthermore, the witness specifically identified the author and his relationship to Rhone-Poulenc and further testified to the negotiating proceedings contemplated by the proffered exhibit. (TR. 562, 577, 578, 628-634, 563-567.) To require a witness with specific personal knowledge of the document to testify as a condition of admissibility after authenticity has been stipulated, makes the stipulation meaningless. 7 Wigmore, Evidence §§ 2128(3), 2130-2132. (After authentication, "counsel" may read or submit document to jury.)

CONCLUSION

For the reasons stated above and in the main brief for the Appellants, the final decision of the United States District Court should be reversed.

Respectfully submitted,

/s Frank Steiner
Frank Steiner #3600
Ann Buntin Steiner
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have been mailed to Cary Schwimmer, Esq., Young & Perl, P.C., 2380 One Commerce Square, Memphis, Tennessee 38103, William N. Ozier, Esq., Bass, Berry & Sims, 2700 First American Center, Nashville, Tennessee 37238, C. Dewey Branstetter, Jr., Esq., Branstetter, Kilgore, Stranch & Jennings, 200 Church Street, Nashville, Tennessee 37201 and to George E. Barrett, Esq., Barrett, Johnston & Parsley, 217 Second Avenue North, Nashville, Tennessee 37201-1601, this 24th day of June, 1994.

/s Frank Steiner
Frank Steiner

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OMISSIONS

(LOGO)

July 22, 1991

ICI Specialties
P.O. Box 152
Mt. Pleasant
Tennessee 38474

Telephone (615) 379-3257
Fax (615) 379-7124

W. B. Hendry

Rhone-Poulenc

P O Box 472

Mt. Pleasant, Tn 38474

Dear Mr. Hendry:

I hereby return to you the document entitled "Notice of Intent" signed by Mike Lindsey, which you sent to Bob Stringer by letter dated July 15, 1991. The document you sent has no application to ICI Americas Inc. No current or former employee of Rhone-Poulenc has "rights to move to" ICI Specialties, Mt. Pleasant plant.

Any persons interested in employment with ICI, including current or former employees of Rhone-Poulenc, are free to fill out employment applications with our company. Applications for persons who are or were employed with Rhone-Poulenc will be considered on the same basis as applications submitted by any other person.

Sincerely,

/s Stanley M. Straker
Stanley M. Straker
Plant Manager

cc: C. Boyd
B. Francis